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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, and CALVIN KOVENS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 15, 1968.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals on the earlier appeal of this cause are reported at 367 F. 2d 698 and are printed as Appendix A, *infra*. The District Court's opinion on remand by this Court is reported at 273 F. Supp. 141 and is printed as Appendix E, *infra*. The majority and dissenting opinions of the Court of Appeals on the instant appeal are not yet reported, but are printed as Appendix F, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix G, *infra*) was entered on August 15, 1968. A timely petition for rehearing was denied on November 7, 1968 (Appendix H, *infra*). On November 26, 1968, Mr. Chief Justice Warren extended the time for the filing of a petition for a writ of certiorari to January 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Can a criminal conviction stand where the government gains knowledge of a proposed defense by illegally eavesdropping on the conversation of a defendant and thereafter tailors its evidence to destroy such defense?

II. May the government, through an intentional concealment of the existence of certain relevant documents from the Court as well as the defense, unilaterally usurp the Court's function of determining whether the documents are producible under 18 U.S.C. § 3500?

III. Are the principles of *Brady* v. *Maryland* violated by the Court's holding that governmental suppression of evidence favorable to the defense is permissible so long as the government does not use such evidence at the trial and such evidence does not lead to any other evidence which is used at the trial?

IV. Where the government has illegally eavesdropped on conversations of an accused, is a mere *prima facie*

showing the standard for determining whether the government has met its burden of proving such illegality did not taint the conviction, or is the proper standard, beyond a reasonable doubt under the principles of *Chapman* v. *California*?

V. Is the defense entitled to examine the contents of the government's illegal overhearings of the accused, or may the trial Court determine *in camera* the relevance of such overhearings to the convictions?

VI. Are an accused's fifth and sixth amendment rights violated by the government's admitted illegal eavesdropping upon conversations of defense counsel and upon defense investigators; and, may the government withhold such overhearings from the accused and the trial Court?

VII. Is the application of Rule 27 Fed.R.Crim.P., violative of the confrontation clause of the sixth amendment where, as here, proof by affidavit is permitted to show the non-existence of additional illegal eavesdroppings on defendants' conversations?

VIII. Can criminal convictions stand where a trial judge communicates with a deliberating jury in the absence of petitioners and their counsel especially where there has been no showing that these communications were not prejudicial to the petitioners?

IX. Can mail and wire fraud convictions stand where, irrespective of the good faith of the accused, the jury is instructed that one using a position of trust to obtain benefits thereby is performing an active fraud punishable by the criminal statute?

X. Can a fair trial be preserved through the use of a cautionary instruction directing the jury to disregard incriminating evidence previously held admissible against one defendant in a joint trial but which evidence is subsequently excluded as to all defendants because of its highly prejudicial and inflammatory content?

XI. Was it error for the trial Court to refuse to make inquiry of the jury where it was shown that before jury deliberations: a) highly prejudicial newspaper statements pertaining to the denial of motions for acquittal, and the content of evidence excluded at trial as too prejudicial, reached the sequestered jury; and b) some jurors made many prejudicial statements to other jurors?

XII. Was it reversible error for the trial judge to deny petitioners a severance from a co-defendant, whose irrational conduct during the trial caused irreparable prejudice, and at a minimum, should the trial judge have ordered a mental examination of such co-defendant?

XIII. Is an accused's effective right to testify on his own behalf precluded by his impeachment through the use of a non-final conviction for a subsequent, unrelated, but highly prejudicial offense?

XIV. Are rules 24(c), F.R.Cr.P., and 28 U.S.C. § 1861 violated by removing a juror immediately before commencement of deliberations without ascertaining whether the juror has become unable or disqualified to perform his duties?

XV. In a joint conspiracy trial, is it prejudicial error to admit evidence of many transactions which do not relate to the common object of an alleged scheme and conspiracy, such transactions being either wholly irrelevant or tending to prove separate and multiple schemes and conspiracies?

XVI. Should this Court reverse a conviction where the District Court has failed to hold the full adversary hearing directed by the opinion of this Court for development and consideration of the effect of eavesdropping upon the conviction?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment, Constitution of the United States, provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of counsel for his defense."

Section 4244, Title 18, United States Code, provides in pertinent part:

> "Whenever * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.

> * * * If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. * * *"

Section 1861, Title 28, United States Code, provides in pertinent part:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
>
> * * *
>
> (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

Rule 8, Federal Rules of Criminal Procedure, provides:

> "Rule 8. Joinder of Offenses and of Defendants.
>
> (a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 24(c), Federal Rules of Criminal Procedure, provides in pertinent part:

> "(c) Alternate Jurors. * * * Alternate jurors in the order in which they are called shall replace jurors

who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. * * *."

Rule 27, Federal Rules of Criminal Procedure, provides:

"Rule 27. Proof of Official Record.

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Rule 43, Federal Rules of Criminal Procedure, provides in pertinent part:

"Rule 43. Presence of the Defendant.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules."

Rule 44, Federal Rules of Civil Procedure, provides in pertinent part:

"Rule 44. Proof of Official Record.

(a) Authentication.

(1) *Domestic.* An official record kept within the United States * * * or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule * * * is admissible as evidence that the records contain no such record or entry."

STATEMENT

The indictment in 28 counts charged 27 substantive violations of the mail and wire fraud statutes, and a conspiracy to commit such substantive violations. Each count charged all petitioners. The trial judge acquitted all of the petitioners on five substantive counts, and two substantive counts were dismissed on the Government's motion. The jury found all the petitioners guilty on the conspiracy count, and certain of them guilty on various of the remaining substantive counts. The sentences imposed ranged from five years' imprisonment and a $10,000.00 fine for petitioner Hoffa to one hour in custody and a $5,000.00 fine for petitioner Weinblatt (D.A. 41-77, 25, 28, 31-32).[1]

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[1] "D.A." references are to the pages of the consolidated appendix for defendants as printed for the Court of Appeals in the original appeal, Nos. 14892-14898, inclusive.

"G.A." references are to the pages of the Government's additional appendix as printed in one volume for the Court of Appeals in the said original appeal.

"Tr." and "Ex." references are, respectively, to the typewritten transcript of the original trial proceedings and the exhibits received at the trial, all now on file with the Court.

"H.D.A." references are to the pages of the appendix for defendants-appellants filed in the Court of Appeals in the second appeal, No. 16634.

"H.Tr." and "H.Ex." references are, respectively, to the typewritten transcript of the "eavesdrop hearing" proceedings and the exhibits received at such hearing.

"Br. in Opp." references are to pages of the "Brief For The United States In Opposition" to petitioners' earlier petition for writ of certiorari, No. 1003, O.T., 1966.

"App." references are to the pages of the appendices printed at the conclusion of this Petition.

The Court of Appeals affirmed all convictions by a two-to-one vote, and denied rehearing *en banc* by a vote of seven-to-two.

Thereafter, defendants filed a petition for writ of certiorari. The Solicitor General responded and advised this Court that on December 2, 1963, some six months after the indictment in the case, a conversation between defendant Burris and one Benjamin Sigelbaum concerning the instant case was overheard by agents of the Federal Bureau of Investigation as a result of illegal electronic eavesdropping. This was the only disclosure of any illegally intercepted conversation.

Based upon the Government's confession, this Court granted the petition for writ of certiorari as to all defendants, vacated the judgment of the United States Court of Appeals for the Seventh Circuit, and remanded the case to the District Court for a hearing (hereinafter sometimes referred to as "the hearing") to determine whether the convictions were tainted by such eavesdropping.[2] This Court preserved to all affected parties the right to seek further appellate review. In view of the Government's confession, this Court did not reach "any of the contentions urged by petitioners in support of their petition for a writ of certiorari." *Hoffa, et al* v. *United States,* 387 U.S. 231 (1967).

After this Court's remand of the case to the District Court, the Government revealed for the first time, at that hearing, that it had in its possession *nine other* overhearings of some of the defendants. *Hoffa, et al.* v. *United*

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[2] Mr. Justice Black dissented from the vacation of the Court of Appeals' judgment and from the remand of the case to the District Court, but "would grant certiorari and set the case for argument". *Hoffa, et al.* v. *United States,* 387 U.S. 231, 234 (1967).

States, 273 F. Supp. 141, 143 (N.D. Ill. 1967). These previously undisclosed additional overhearings were submitted to and reviewed by the District Court *in camera.*

The District Court, after the hearing, found that the convictions were not tainted by the eavesdropping, reinstated the convictions, and imposed the same sentences previously imposed on the defendants. *United States* v. *Hoffa,* 273 F. Supp. 141 (N.D. Ill. 1967) (App. E, *infra,* p. 90).

During the oral argument of the appeal taken from the District Court's decision on that hearing, the attorney who represented the Government disclosed for the first time in any court proceeding that eavesdropping of certain defense attorneys had occurred. The attorney handed to the Clerk of the Court of Appeals a sealed folder which contained the FBI logs of the conversations. A panel of the Seventh Circuit examined *in camera* the contents of the sealed folder (App. F. *infra,* pp. 98, 117). A motion of defense counsel to examine the admitted overhearings of lawyers was denied.

The Court of Appeals affirmed all convictions by a two-to one vote, and denied a petition for rehearing.

For the convenience of the Court, we present as Part I of this Statement, the facts relating to issues arising from the Government's unlawful eavesdropping and the hearing on remand, and as Part II, the facts relating to issues which arose during trial.

I.

GOVERNMENT'S ADMITTED ILLEGAL OVERHEARINGS AND PETITIONERS' RIGHTS AFFECTED THEREBY.

A. The Object of The Alleged Conspiracy.

The indictment alleged that defendants banded together to obtain, by means of false and fraudulent representations, 21 specified loans totaling $20,000,000.00 from the Central States, Southeast and Southwest Areas Pension Fund (hereinafter referred to as "the Fund") for 14 separate businesses.[3] It was further charged that some defendants demanded and were paid by the said businesses, fees and other benefits totaling $1,000,000.00 for obtaining these loans. Finally, the indictment charged a two-fold object of the conspiracy and scheme: (1) to obtain $100,000.00 of such fees and benefits for the purpose of relieving the distress of Sun Valley, Inc., a real estate development company in which defendant Hoffa was claimed to have an interest,[4] and (2) to divert, for purposes other than those

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[3] The Fund is administered jointly by eight employers and eight union trustees. (Ex. 1, Article II, Sec. 2; D.A. 1959, 555). Each trustee has one vote only, and no one trustee has any authority over any other. (Ex. 1, D.A. 874, 1964).

The Fund regularly invests a part of its $300,000,000.00 assets in loans to real estate ventures such as those involved in this case. (D.A. 818-822, 868-873, 1795, 1967-1971).

[4] Both the majority and dissenting opinions of the Court of Appeals stated that the common object or design of the claimed scheme and conspiracy was to obtain money for the purpose of relieving the financial distress of Sun Valley for Hoffa's benefit. *United States* v. *Hoffa, et al.*, 7 Cir., 367 F. 2d 698. This Court's *per curiam* opinion states that the "prime objective" was the financial rehabilitation of Sun Valley, Inc. *Hoffa, et al.* v. *United States*, 387 U.S. 231; App. D, *infra*, p. 74.

represented to the trustees the entire $1,000,000.00 in fees and benefits for the personal use of all of the defendants (D.A. 41-77).

The indictment generally alleged that the defendants Dranow, Burris, Kovens and Weinblatt cooperated in seeking out loan applicants and assisting them in preparing materially false applications to the Fund. Strate and Hyman were alleged to have been among those who submitted such applications. Defendant Hoffa was alleged to have used his position as a trustee of the Fund to further misrepresent the facts and thereby influence approval of the loans.

Defendants Dranow and Burris, together with Benjamin Sigelbaum and others not claimed to be conspirators, took steps to reorganize and refinance Sun Valley (D.A. 1403, 1405, 1407, 1554-55). Burris and Sigelbaum were both key figures in said reorganization. Burris initiated and furthered the project of reorganizing Sun Valley, Inc. by raising necessary capital to pay off its creditors, get it out of bankruptcy and acquire its ownership. Sigelbaum contributed substantial capital to the project, and induced others to do the same, thus arranging for a total of more than half of the required capital. Sigelbaum was not a witness at the trial.

B. Government's Confession In This Court.

In response to defendants' petition for a writ of certiorari to review the judgment of the Seventh Circuit, the Government advised this Court that pursuant to its policy announced in the Government's Supplemental Memorandum in *Schipani* v. *United States*, 385 U.S. 372, the Government "conducted a review to determine whether electronic eavesdropping or wiretapping affected the convictions of any of the petitioners". The Government asserted:

> "We have found nothing in that review warranting notification to this Court or any further proceedings

in this regard with respect to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman." (Br. in Opp. 64)

With respect to defendant Burris, however, the Government advised for the first time that the FBI had secretly installed and maintained a microphone in the Miami office of Benjamin Sigelbaum for the two and one-half year period from January, 1963 until July, 1965 (Br. in Opp. 64), and that on December 2, 1963, six months after indictments in this case, overheard and recorded a conversation between Sigelbaum and defendant Burris.[5]

The Government advised this Court that defendant Burris "apparently" visited Sigelbaum's office on that one occasion during the period of the unlawful surveillance, that defendant Burris engaged in such overheard conversation, and that the only participants in the conversation were Burris and Sigelbaum. The Government also stated that "a verbatim transcript of that conversation appears in the FBI logs" (Br. in Opp. 64), but did not furnish such transcript to this Court. Rather, it merely presented a one paragraph resumé of the said conversations.

The Government admitted to this Court that the contents of that eavesdropped conversation had been summarized in a report which was sent to some of the *Government attorneys* who prosecuted the case,[6] but claimed that

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[5] The Government failed to disclose that during pre-trial proceedings before the original trial, defense counsel requested the Court to order the Government to produce any recordings of "bugged" conversations relating to this case, even if the Government claimed the "bugging" was legal. The Government remained silent at that time. (H.D.A. 490-492).

[6] The hearing below disclosed that two separate FBI "summary reports" of the conversation had been prepared. Both summaries were sent to the FBI Washington headquarters and Chicago Field Office and one such summary was received by many Government trial counsel (H.D.A. 1052-54, 1033, 1059).

"any information contained therein that was remotely relevant to the facts of the case was already known to them from other sources" (Br. in Opp. 65).[7] Such report was not furnished to this Court. The Government also represented that "the conversation was never used as the basis for any investigative lead by the government attorneys, the Federal Bureau of Investigation or any other government agency" (Br. in Opp. 65), and that the eavesdropped conversation "related to a minute, peripheral aspect of the many transactions underlying the charges. . . . ." (Br. in Opp. 66).

The Government did not advise this Court that the foregoing "summary report" was prepared by a major Government trial witness, FBI Agent John C. Connors, who had prior to the indictment been assigned to the investigation of defendants Hyman, Kovens, and Hoffa and anyone else in connection with Pension Fund Loans (H.D.A. 1024-25, 1094.)

Furthermore, while the government represented to this Court that a potential defense witness was discussed, it vouched "[t]he possible witness mentioned in the conversation never testified, and the government does not, to this day, know who he is or his relation to any of the parties or transactions involved in this case." (Br. in Opp. 65-66). The hearing disclosed, however, that the Government had interviewed that person a year before the trial and obtained an affidavit from him (H.D.A. 224-226, 1332-1334).

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[7] The hearing disclosed that at least six documents were not in the prosecutors' possession until shortly before trial (H.D.A. 103-4, 1108, 1240). Of the six, the district court specifically relied on three to support his conclusion that the Government did have prior knowledge of the contents of the eavesdropped conversation (H.D.A. 167-8).

C. This Court's Order.

Although the Government urged that any inquiry into such unlawful eavesdropping activity be confined to the conviction of defendant Burris, this Court held that all defendants were entitled to such a hearing. 387 U.S. 231.

This Court noted the Government's representation and based on such representation remanded the case to the District Court for a hearing, findings and conclusion "on the nature and relevance to these convictions of the recorded conversation, and of *any other conversation that may be shown to have been overheard through similar eavesdropping*" (emphasis added; 387 U.S. 231, 233).

Accordingly, this Court granted the writ of certiorari as to all defendants, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further proceedings, directing the District Court to confine the evidence presented *by both sides* "to that which is material to the questions of the content of this and *any other electronically eavesdropped conversations,* and of the *relevance* of any such conversations to petitioners' subsequent convictions". 387 U.S. 231, 233-34 (emphasis added).

D. Government Log Of The Eavesdropped Conversation And "Summary Reports" Of Said Log.

On the remand of the case, the Government, for the first time, filed with the District Court and furnished defendants the log of the overheard Sigelbaum-Burris conversation.

Agent Connors testified that the eavesdropping log was routed to him about December 2, 1963 by "somebody"[8]

[8] The defense unsuccessfully attempted to determine the reasons why the log was routed to Connors, but were prevented from doing so by the trial court (H.D.A. 1023-1026).

in a supervisory capacity in the FBI Miami office (H.D.A. 1023, 1047), that he knew the conversation between Burris and Ben Sigelbaum had been monitored by microphone surveillance (H.D.A. 1027), and that he had identified Burris as being one of the participants in the conversation[9] (H.D.A. 1046, 1048). Connors knew at the time he received the log that Burris was under indictment (H.D.A. 1076). On January 11, 1964, Connors prepared a "summary report" of the eavesdropped conversation. It was furnished defendants for the first time at the hearing (H.D.A. 33, 233-252).

During the years 1962, 1963, and up to January 13, 1964 (H.D.A. 1004), agent Connors was assigned to Miami, Florida to investigate defendant Hyman and his Key West properties, petitioner Kovens' activities in connection with the Pension Fund (H.D.A. 1024-25, 1094), and Hoffa in connection with the Key West loans and other Pension Fund loans (H.D.A. 598). Connors was also instrumental in preparing the Government's evidence concerning all of the financial transactions involved in this case (H. Def. Ex. 7; H.D.A. 221-224), but had nothing to do with any separate investigation of Benjamin Sigelbaum (H.D.A. 1099). Connors ultimately became one of the Government's principal witnesses at the trial of this case (H.D.A. 585-598; D.A. 1681-1732, 1737-1742).

A routing slip or transmittal sheet was attached to the "summary report" and disclosed that the Director of the FBI sent the report to the Assistant Attorney General, Criminal Division, Herbert Miller, and to the attention of Walter J. Sheridan, who worked for Attorney General Robert Kennedy as a special investigator on matters in-

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[9] FBI Agent Doerner testified that his supervisor, Mr. Swinney, routed the log to Connors (H.D.A. 1269).

volving petitioner Hoffa (H.D.A. 1273-1277). Miller testified that he thought that the summary probably went to Sheridan's office because most investigative reports concerning Hoffa usually went there (H.D.A. 1276-1277). A secretary in Sheridan's office wrote "Poretz, Smith, etc." on the transmittal sheet (H.D.A. 127). Poretz was the Government attorney then in charge of the trial, and Smith was his co-counsel.

Poretz routed the summary by writing on the transmittal sheet the names of Government attorneys who assisted him: Ryan, Canavan, and McTiernan. Messrs. Ryan, Canavan, and McTiernan initialed the report after it came to their attention (H.D.A. 126-127, 1114).[10]

The notations made by Government prosecutors upon the January 11, 1964 summary of the overheard conversation are of such magnitude to a meaningful determination of the ultimate issues, that we reproduce the same hereinbelow for the Court's observation.

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[10] William Ryan, the only Government trial counsel who testified at the hearing, said that he recognized his initials on the summary report and that he probably saw it shortly after January 11, 1964 (H.D.A. 1114), approximately three months before the commencement of the trial.

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

Miami, Florida
January 11, 1964

RECEIVED
JAN 14 1964

RE: JAMES RIDDLE HOFFA; ET AL;
TEAMSTERS UNION PENSION FUND LOANS,
CHICAGO, ILLINOIS

The following information has been obtained by the Miami Office of the FBI from a source of information whose identity is confidential and who is not available for recontact or for testimony.

The source advised that S. George Burris and Ben Sigelbaum of Miami recently negotiated regarding the possible sale of Burris' interest in Sun Valley to Sigelbaum. Sigelbaum insists that he had a prior claim against Burris' interest, and he had not pressed it before because Ben Dranow was getting in trouble and everybody wanted to get Dranow and Hoffa straightened out. Burris' contention, according to the source, is that he put up the money for a 10 per cent interest by borrowing $57,000 from Kipnis and that later he repaid Kipnis from a fee Kipnis paid him. He contended that he was supposed to get another $90,000.

Irving B. Kipnis

Sigelbaum also contended, according to the source, that one Barney and a Yiddy, or Uddy, also had a claim against Burris' interest in Sun Valley but Burris' contention is that their claim is against Dranow's interest.

Sigelbaum promised Burris, according to the source, that he would work out a deal with him and that he did not think there was enough money in the world to compensate him for what he had gone through. Sigelbaum's feeling, the source indicated, is that everybody went into Sun Valley to

X 1 cop

PLAINTIFF EX. 2-3 id RJC

make money, and he put money in to bail out Ben and Sun Valley, and they sit back and know nothing except that they made a profit. Both Sigelbaum and Burris agreed that the important thing is that they are walking the streets, according to the source.

The source advised that Burris feels that in the pending Hoffa trial in Chicago, the government will throw in everything and hope that the jury will feel that where there is smoke there must be fire.

Sigelbaum's feeling about the Chicago trial was that the conspiracy had to be proven and commented that a lot of people had been subpoenaed.

According to Burris, the source advised, if the witnesses tell the truth, they would have to say there was no conspiracy, that no one was ever promised anything, that everyone had to go before a fund where there were disinterested people, and that the properties were all properly appraised with extra collateral required in many cases.

Sigelbaum stated, the source advised, that one Bill Manhaight, an attorney, who is building a hotel in Atlantic City, would be a good witness for the defense and indicated that Manhaight would say he had met Burris in connection with a loan, that he had a difficult time getting a loan, and had to put up additional collateral.

Such testimony would help defendants

Sigelbaum also stated, according to the source, that every big criminal lawyer in Chicago wanted to get into the case.

Burris felt, according to the source, that in the Key West case, Sam Ryzen used the money a little differently

when he first obtained it and then ultimately put it into the property.

PROPERTY OF FBI - This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

In the foregoing report, Agent Connors summarizing and analyzing the log of the eavesdropped conversation, reported among other things that:

(1) Burris and Sigelbaum recently negotiated the possible sale to Sigelbaum of Burris' interest in Sun Valley and Sigelbaum said the reason he had not pressed his claim against Burris was that Dranow was getting in trouble and everyone wanted to see Dranow and Hoffa straightened out.

(2) Burris stated that he had borrowed $57,000.00 from Kipnis which Burris used for his 10% interest in Sun Valley, and that he had repaid the $57,000 from a fee Kipnis paid him. Burris also contended that he was supposed to get another $90,000.00. [*In the margin of the report dealing with this discussion, Charles Smith, one of the chief trial counsel for the Government, penciled the name of "Irving B. Kipnis", a Government witness* (H.D.A. 126-127)].

(3) Burris said that if the witnesses told the truth, they would say that (a) there was no conspiracy; (b) no one was promised anything; (c) the loans had to be approved before a disinterested board; and (d) the properties were all properly appraised with extra collateral required in many cases. [*The thoughts and statements of Burris were bracketed in pencil by an "unknown person".*][11]

(4) Sigelbaum stated that Bill Manheight, an attorney who was building a hotel in Atlantic City, would be a good defense witness and indicated that Manheight would say he met Burris in connection with a loan, that he had a difficult time getting a loan and had to put up additional

[11] The defense requested that the Government identify the person who bracketed Burris' statements, but the Government replied that it did not know the person's identity.

collateral. [*In the margin at this portion of the report, Abraham Poretz, the original chief trial counsel for the Government, wrote: "Such testimony would not be admissible."* (H.D.A. 126-127)].

(5) Burris said that in the Key West case, defendant Sam Hyman used the money a little differently when he first obtained it and then ultimately put it into the property. [*In the margin at this portion of the report, Poretz wrote: "Does this check out?"* (H.D.A. 126-127)].

In addition to the foregoing report, Connors had on December 26, 1963 prepared an earlier report of the eavesdropped conversation. This report was sent by him to FBI headquarters in Washington, D.C. and to the Chicago Field Office of the FBI. Connors said that the January 11, 1964 report was simply a re-submission of the December 26, 1963 report after administrative corrections, including the omission of direct quotations (H.D.A. 1058). The dissenting opinion in the Court of Appeals found that the January, 1964 report was "written in an attempt to camouflage the fact that the information in the report was obtained from a 'bugged' conversation." (App. F, *infra*, p. 106).

E. The Advantage Derived By The Government As A Result Of The Unlawful Eavesdropping.

During the course of the hearing, the Government introduced numerous exhibits (H. Gov. Exs. 4-27) for the purpose of showing that the Government's evidence presented at trial was not tainted by the illegal eavesdropping. At the close of the eavesdrop hearing, the Government contended that the "*prosecutors*" had knowledge of a "*majority*" of the Government's exhibits prior to the date of the eavesdropping and had knowledge of all of the exhibits prior to trial (H.D.A. 1240).

The District Court held that (1) the Government obtained no new information from the eavesdropping; (2) none of the overhearings had any relevance to the convictions of the defendants; and (3) "the convictions of none of the defendants were tainted by *the use of evidence improperly obtained.*" (Emphasis added; App. E, *infra* pp. 89-90)[12] The Court did not make the specific findings of whether investigative leads or "follow-ups" resulted from the eavesdropping.

At the trial, in support of the Government's allegations that loan proceeds were spent for a different purpose than that represented to the Fund, Connors testified about his preparation of summary charts showing the receipts and disbursements of Key West Foundation Company from November, 1959 to December 31, 1960 (H.D.A. 585-598). The defense vigorously opposed Connors' testimony and the introduction into evidence of his charts on the ground that he had not considered any expenditures made after December 31, 1960 when, in fact, Key West had expended large amounts of money for building improvements in early 1961 (D.A. 1774-1783). Initially, Connors testified that his charts were intended to reflect "what was truly spent for building improvement" (H.D.A. 587). Later, however, he admitted that some expenditures for fixed assets of Key West were not included in his charts and that they reflected only what the books of Key West showed with regard to building improvements (H.D.A. 588). The defense unsuccessfully moved at trial to strike Connors' testimony (H.D.A. 586), pointing out that sizable

[12] Although the Court's findings are ambiguous, it seems that the Court acknowledged the "use" of the log and summary by the Goovernment attorneys, but because one or several Government employees (including the IRS) possessed prior "independent source information", the "use" did not taint the convictions.

expenditures were made by Key West during early 1961 and at other times which were not shown on Connors' charts (H.D.A. 586-598; D.A. 1681-1732, 1737-1742).

Connors said, at trial, that the Government attorneys requested him two weeks before trial to end his summaries with December 31, 1960, even though he had previously prepared worksheets covering the subsequent periods (H. D.A. 597, 1019). These prior worksheets were destroyed by Connors after his consultations with Government counsel and after Government counsel saw the worksheets (H. D.A. 594, 1017, 1019).

Indeed, it was learned for the first time at the eavesdrop hearing that on October 8, 1963 Connors had prepared a report relating to his discussions with Government counsel Poretz and Ryan during the week of September 30, 1963 (H.D.A. 221-224). Among other things, that report stated that the accounting summaries to be prepared for the trial should *include* the receipts and disbursements of Pension Fund borrowers "during the period covered by investigation" (H.D.A. 221). *The report specifically stated that the period covered by the chart with regard to the Key West Project was to terminate April 30, 1961* (H.D.A. 222). At the time of Connors' changes to his accounting documents both he and the trial prosecutors were aware of the proposed defense disclosed by the overheard conversations.

Two of the judges of the Court of Appeals sustained the District Court's finding that the convictions were not tainted by the illegal evidence. In support thereof they asserted that the indictment was returned six months before the overhearing and spelled "out in detail the roles played by each of the defendants", mentioned all of the proven loan transactions, and therefore such particularity could not "have been obtained from a cryptic half hour

conversation which occurred six months after the indictment had been returned." (App. F., *infra,* pp. 96-97). The dissent stated that the knowledge gained by the overheard conversation as to the intended defense to the Government's charges was used by Agent Connors, pursuant to the directions of the Government prosecutors, to tailor his accounting summary and his testimony in order to destroy the defense. (App. F, *infra,* p. 112). The majority opinion did not consider whether the Government had "tailored" its proof to destroy the defense.

F. Government's Unilateral Decision To Conceal "Jenck's Statements" From Trial Court And Defense.

During the trial, there was an understanding approved by the Court that "3500 material" would be furnished defense counsel the evening before a witness' testimony without the necessity of renewing a request therefor (H.D.A. 533-534).

In addition, defense counsel specifically asked Connors at trial if he had rendered "any report concerning your work?" (H.D.A. 594). Connors answered that he had not rendered any reports or FBI Form 302 reports (H.D.A. 594). Defense counsel then asked: "Not one in this whole period of time?", but the Government's objection was sustained (H.D.A. 594). The next day, defense counsel again asked Connors: "Who have you told about your investigation—about the results of your investigation?" The Court sustained the Government's objection, stating, "You went all over that yesterday looking for 3500 statements." (H.D.A. 598).

Despite the Government's initial denial that Agent Connors had prepared any reports, it was disclosed at the eavesdrop hearing that he had in fact prepared three reports in 1963 and 1964. Two of the reports were the sum-

maries, dated December 26, 1963 and January 11, 1964, of the electronically overheard Burris-Sigelbaum conversation. In the third report, written on October 8, 1963, Agent Connors set forth the type of accounting summaries he was to prepare for use at the trial. This report was produced by the Government at the hearing in response to a demand for the production of "3500 statements" (H.D.A. 1057).

The majority of the Court of Appeals held that the aforesaid memoranda failed to meet the statutory requirements of 18 U.S.C. §3500. With respect to the summaries of the Burris-Sigelbaum conversation, the majority stated that these summaries did not relate to Connors' accounting testimony and, therefore, had no impeachment value to the defendants. (App. F, *infra,* p. 99). The dissent concluded that the refusal by the Government to admit that Agent Connors had prepared any reports, was a unilateral usurpation of the District Court's function to determine whether the documents came within the purview of Section 3500. The dissent further stated that the three reports were "relevant and material to the defense", commenting that Agent Connors "lied on the witness stand" in denying at the trial that he had made any reports during his investigation (App. F, *infra,* pp. 115-116).

G. The Denial To The Defense of Additional Admitted Eavesdrops On Defendants' Conversations.

In its response to defendants' earlier petition for certiorari, the Government mentioned only the December 2, 1963 overheard Burris-Sigelbaum conversation, and represented to this Court that its review of its files reflected nothing which warranted notification to this Court with respect to any of the remaining defendants. No reference or representation whatever was then made as to any other eavesdropped conversation of any of the defendants. At

the eavesdrop hearing, the Government did, for the first time, admit that there were indeed nine other overhearings of "some of the defendants". These additional overhearings were submitted to the Court for an *in camera* inspection on the Government's representation that they were irrelevant to the convictions. (H.D.A. 849). The defendants' request to examine the contents of the exhibit was denied (H.D.A. 855-64, 865); and the Court found, based thereon, that these additional overhearings contained "no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted." 273 F. Supp. 141, 143. The majority of the Court of Appeals agreed with that conclusion. (App. F, *infra, p.* 94).

H. The Denial To The Defense Of Admitted Eavesdropped Conversations Of Defense Counsel And Investigators.

Before and during the eavesdrop hearing, the defense sought to obtain from the Government all logs, records, reports or other information relating to any electronic eavesdropping or electronic surveillance by the Government on counsel for the defendants (H.D.A. 39, 79). Although the Government represented to the District Court that it had in its possession no records of overheard conversations of the defendants other than those already disclosed, it pointedly made no representation as to whether it did or did not have records of conversations of defense counsel (H.D.A. 619, 623). The defense made numerous renewals of its request for the production of such records, but such requests were repeatedly denied by the District Court (H.D.A. 635, 642-643, 857-858, 838-843, 866, 1437, 1513). The Government took the position with regard to these requests that it was required to disclose to the Court only those eavesdropped conversations in which a defendant participated.

The Government's position was reiterated in its brief filed in the Court of Appeals. However, in response to a question from the Court during the oral argument on appeal, Government counsel revealed that the Government possessed logs of eavesdropped conversations of certain defense attorneys. At the conclusion of the oral argument, Government counsel left with the Clerk of that Court an envelope containing those logs, with instructions that the contents be made available only for the use of the Court. A defense request to examine the contents of the envelope was denied.

The majority opinion in the Court of Appeals indicated that it had examined *in camera* the contents of the sealed folder containing the eavesdropping of defense counsel and concluded that "the information is completely irrelevant to the Hoffa case before this Court" (App. F, *infra*, p. 98). In regard to the Government's conduct, the dissent stated:

> ". . . The Government's narrow and cavalier response to the Supreme Court's broad direction ought not to be condoned." (App. F, *infra*, p. 117),

and that it was improper for the Court of Appeals to initially examine the logs, whether *in camera* or not, to determine their relevancy to the issues and the case.

At the time of the indictment and trial below and for some long prior period, Charles O'Brien was employed as an investigator to assist the defense attorneys concerning the pending indictments against Hoffa, including the indictments involving Sun Valley transactions (H.D.A. 120, 1461). During the month of January, 1964 and for months prior thereto, he had frequent telephone conversations with defense attorneys regarding investigatorial assignments relating to the Sun Valley matters (H.D.A.

1461-1462). In 1967, a conviction of O'Brien in the Federal District Court, Eastern District of Michigan, was reversed by this Court because of the admitted eavesdropping by the Government on a telephone conversation between O'Brien and his counsel in January, 1964 (386 U.S. 345). Said counsel was also then counsel for petitioner Hoffa in the instant proceedings (H.D.A. 120, 1461).

At the hearing, the Government adamantly refused to produce the logs and other memoranda relating to the admitted electronic surveillance of O'Brien for defendants' inspection, and the Court denied defendants' requests and subpoenae for such documents (H.D.A. 630-639, 961-964, 1290, 1368, 1447-1448). The Court at one point (H.D.A. 964) indicated that the O'Brien log would not be ordered produced in the absence of an affidavit that O'Brien discussed Sun Valley matters with defense counsel. When just such an affidavit was filed by O'Brien (H.D.A. 128, 1290-1), the Court nevertheless denied the defense requests for such logs (H.D.A. 1368). The request was again made and denied (H.D.A. 1465), after O'Brien *testified* with regard to his employment by the defense and his frequent use of the telephone in discussing his work on the case with defense counsel during January, 1964 and prior thereto (H.D.A. 1460-1465).

Though this issue was raised in the Court of Appeals, it did not consider whether the defendants were entitled to examine such logs.

I. The Admission Of Evidence By Affidavits.

The District Court ruled that the Government was required to prove at the hearing not only that the December 2, 1963 overheard conversation did not taint the convictions of the defendants, but also that the Government had not eavesdropped upon any other conversations of the

defendants concerning the instant case (H.D.A. 848). Thereupon, the Government attempted to prove that it did not possess such other conversations by introducing into evidence the affidavits of Charles Bolz (H.D.A. 118) and Leon Green (H.D.A. 119).

The Bolz affidavit asserted that he was the Section Chief of the Accounting and Fraud Section of the Federal Bureau of Investigation, that the FBI had caused a diligent search to be made of its records to determine the existence of the overhearing of any conversation participated in by any of the defendants, and that said search resulted in the discovery of only the December 2, 1963 Burris-Sigelbaum conversation and other recorded conversations of defendants which had been turned over to the Court *in camera* as Plaintiff's Exhibit 1-A.

The Green affidavit stated that he was Deputy Assistant Commissioner of the Internal Revenue Service, that the IRS had caused a diligent search to be made of its records to determine the existence of such overheard conversations, and that such search had revealed no such overhearing of the conversations of any of these defendants.

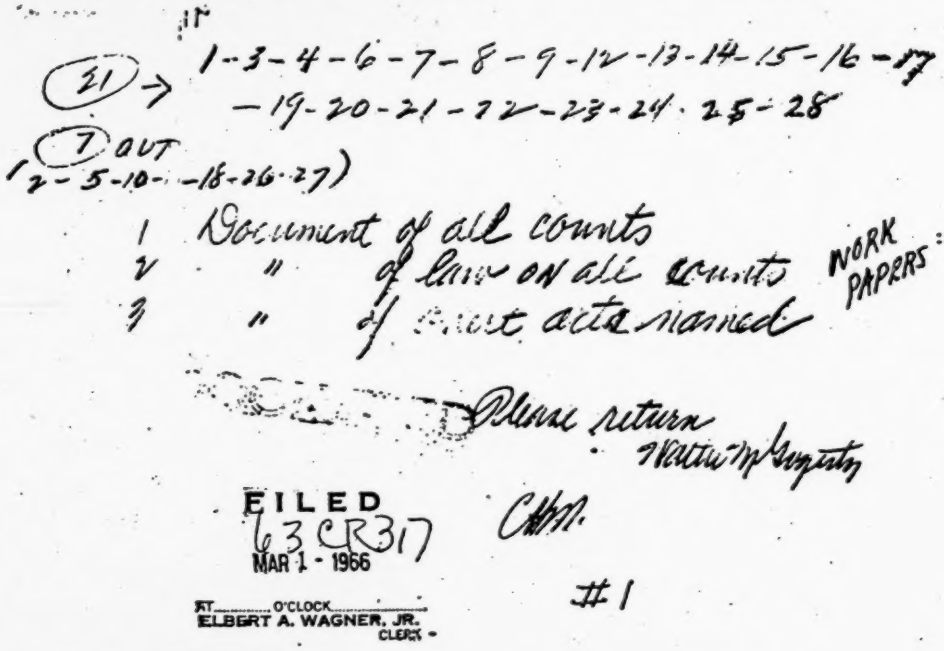
The defense urged that such affidavits constituted hearsay and related to a search not conducted by said affiants; that they were not in charge of the records allegedly searched; that said affiants were not produced in Court for confrontation and cross-examination; and, that the admission of such affidavits constituted a deprivation of defendants' rights to due process of law (H.D.A. 848-849, 853, 858-864). Nevertheless, the Court received such affidavits in evidence (H.D.A. 864). The Court of Appeals, relying on Rule 27, F.R.Cr.P., held that the admission of such evidence was not prejudicial error (App. F, *infra*, p. 96).

II.

VIOLATIONS OF SUBSTANTIAL RIGHTS OF PETITIONERS DURING TRIAL.

A. Communications From Trial Judge To Deliberating Jury In Absence Of Defendants And Their Counsel.

On the evening of the first day of the jury's deliberations, the trial judge, while in chambers, received a written communication from the jury delivered by the Marshal in charge of the jury (D.A. 2178). The communication was in two pages, the second of which merely listed the names of the jurors. The first page, signed by Foreman Gogerty, is reproduced in full.



(D.A. 2179-2180).

In response to this communication, the trial judge, via the Marshal, sent a copy of the indictment to the jury with the oral instruction to them: "This is all that they are going to get" (D.A. 2180). This action was taken without notice to the defendants or their counsel (D.A.

2229), although the Court had promised to notify counsel in the event of any inquiry from the jury. (Tr. 16521-22).

The copy of the indictment was unexpurgated. It contained the seven counts not submitted to the jury. It further contained allegations, incorporated by reference in all counts, of a breach of trust by petitioner Hoffa on which there was no Government proof.[13] (Doc. Ex. 6 of August 17, 1964; Tr. 15294). Those allegations referred to a separate and independent "judicial proceeding" in which petitioner Hoffa was "being questioned . . . [about] a breach of his fiduciary duties" in the handling of his union's funds.[14] (Count I, par. 4(c); D.A. 44). The Court had excluded proferred evidence to this effect and had previously ordered that this part of the indictment not be read to the jury (Tr. 15293-94).

The jury, which had retired on July 24, the day they received the unexpurgated indictment and the instruction that they would get no more, continued their deliberations until July 26 when the verdicts of guilty were returned. After the jury verdicts, petitioners first learned of the trial judge's *ex parte* communication to the jury. A motion for new trial on the ground of the communication was denied (D.A. 2171-2173, 2178-2180, 2239-2243).

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[13] The copy of the indictment also had ambiguous markings on it, including arrows drawn to the name of petitioner Hoffa (D.A. 2173-2175, 2231). Neither the trial judge nor the Marshal made the markings; but, whether they were on the copy of the indictment as received by the jury remains uncertain. Neither the trial judge nor the Marshal examined the copy before its delivery to the jury (D.A. 2174, 2175, 2230).

[14] Over petitioners' objection (D.A. 2153), the Court instructed the jury:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (D.A. 2141; Tr. 15281, 15368; G.A. 226-227).

The majority of the Court of Appeals held that the trial judge's communication to the jury in the absence of petitioners and their counsel, although "not good practice", was "not prejudicial" (App. A, *infra,* p. 28). The dissenting judge: (1) saw "plain error" in the trial judge's action; (2) doubted the need of petitioners to show prejudice for reversal, "since the error committed was of constitutional proportions"; and (3) in any event found that the record does not negative but affirmatively shows a reasonable possibility of prejudice to petitioners necessitating reversal (App. A, *infra,* pp. 45-46).

B. The Jury Instruction That One Using A Position Of Trust To Obtain Benefits Is Performing An Active Fraud.

In this mail fraud case, the trial court, over the objection of petitioners (D.A. 2153), instructed the jury as follows:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (D.A. 2141; Tr. 16505).

The evidence in this case showed the various petitioners had economic relations with each other or with others. The jury could have understood any of these relations to be fiduciary relations.

Further, the Court's sending of the indictment to the jury (see *supra,* pp. 30-32) informed the jury that petitioner Hoffa's actions as an officer of his union were being elsewhere questioned in a federal judicial proceeding "as a breach of his fiduciary duties." (Indictment, Count One, par. 4(c); D.A. 44).

The Court of Appeals found no error in the foregoing instruction. (App. A, *infra*, p. 33). However, the majority opinion stated that the jury could have regarded petitioner Hoffa's "connnection with Sun Valley * * * as a violation of his fiduciary duties to the beneficiaries of the Teamster Pension Fund." (App. A, *infra*, p. 15).

C. Failure Of Cautionary Instructions To Remove Prejudice Ensuing From Incriminatory Admissions Of Co-Defendants.

Co-defendant Dranow testified in his own behalf at trial. During his cross-examination, the prosecutor asked:

> "* * * Did you ever write a letter to S. George Burris in which you told him, 'Everything can be blamed on me, and everything that could be put onto me to protect others should be blamed on me. But don't let that affect your feelings toward me in any way whatsoever'." (D.A. 1910).

The Court overruled objections and motions for a mistrial by other petitioners. The judge instructed the jury to consider the matter only as to Dranow (D.A. 1911). A request for a hearing outside the presence of the jury as to the materiality of the matters contained in the letter was denied, and a motion for a mistrial was denied. The jury was again instructed that the matter was to be considered by them only for the purpose of impeachment of Dranow's testimony and to affect his credibility (D.A. 1912-14).

Petitioners Dranow then testified that although the letter was in his handwriting, he did not recall writing or sending it, or to whom it was written[15] (D.A. 1914-15).

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[15] The letter, Gov. Ex. 1001, was addressed to "George".

Over further objections of defense counsel (Tr. 14397-14401), Dranow was asked if he wrote a second letter, saying:

> "I want the following amounts put away for me from each of the following persons each day. I want all this money put in one spot where it will be picked up four or five times a year, and enable me to pay for the new place and business:
>
> a. The California buildings, $10.00 per day;
>
> b. George Burris, Irving ask George, $10.00 per day;
>
> c. Sam Hyman, George ask Sam, $10.00 per day;
>
> d. Cal Kovens, George ask Cal, $10.00 per day;
>
> e. Glen Hillborn, Fashion Mart Building, George ask Glenn, $5.00 per day;
>
> f. Lou Gladstone, Milton talk to Lou, $15.00 per day." (Tr. 14399).

Objections to this question and motions for severance were again overruled, and the judge again limited the evidence to Dranow. Dranow replied that the letter was in his handwriting, but that he didn't recall the details of when he had written it or whether it had been delivered to Irving Link (D.A. 1915).

Irving Link, who had testified during the Government's case in chief, was later recalled as a rebuttal witness. Link testified that Dranow told him in September, 1962 that there would be mail addressed to a friend of Dranow's, Buck Traub, which was meant for Link. Link said that he picked up a letter thus addressed, which later proved to contain the two letters about which Dranow was questioned (D.A. 2020).

Subsequently, the Court refused to admit the letters into evidence. The Court referred to the prejudicial nature of the letters, noted that an "inference" could be drawn that they referred to Dranow's other prosecutions, and also commented that "weighing the dangers against the benefits, I'm going to protect this record." Later the judge instructed the jury to disregard the testimony of both Dranow and Link in regard to the letters (D.A. 2059, 2061-66). Motions for mistrial and for severance were again denied (D.A. 2062).

During the trial, the Government, over strenuous objection by the defense, was permitted to introduce into evidence certain extrajudicial admissions of the defendant Burris made by him during a congressional inquiry prior to indictment (G.A. 74-82, 92-103). These admissions were highly relevant to the issues before the Court and jury, and were incriminatory to Burris and other defendants. They related to the stock ownership of Sun Valley, and the interests therein of defendants Hoffa, Dranow and Burris and constituted an admission that Burris was in fact a "front" for Dranow in the ownership of such stock (G.A. 74-82). When these admissions were offered, defense counsel objected thereto on the specific ground that the co-defendants would be thereby denied the opportunity to cross-examine Burris with regard to his earlier admissions D.A. 1436-37, 1440, 1458). Yet, the Court overruled such objection and permitted the reading of the admissions to the jury (D.A. 1458; G.A. 74).

The Court of Appeals on the original appeal held that it was proper to try the defendants together inasmuch as they were all part of one conspiracy. Further, that the joint trial with Dranow was not error inasmuch as there was an "extremely close association of Hoffa and Kovens with Dranow in various loan transactions" (App. A, *infra*, p. 18).

The dissent stated that the letters sought to impeach Dranow's testimony were "inherently prejudicial to all defendants" and "conveyed a strong inference of guilt of all". In addition, the dissenting judge stated "as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard such evidence was an impossible task." The dissent found that the defendants' motion for severance from Dranow should have been granted (App. A, *infra,* p. 41).

Thereafter, on appeal from the eavesdropping hearing, the majority concluded that this Court's decision in *Bruton* v. *United States,* 391 U.S. 123, was inapplicable, since the letters used to impeach Dranow were excluded as to all defendants and an appropriate instruction was given. Therefore, they concluded, nothing in *Bruton* affected the validity of their decision with regard to the said letters. Furthermore, the majority held that the admissions made by petitioner Burris were not incriminating as to any co-defendant. (App. F, *infra,* pp. 102-3)

D. Prejudicial Newspaper Articles Imparted To Sequestered Jury By Its Foreman And Prejudicial Statements By Some Jurors.

After jury verdict, but before sentencing, the defense moved for a new trial or inquiry of the jurors on the basis of the testimony of an alternate juror named Pare' (D.A. 2181, 2212, 2213-5). The events testified to by Pare' first came to the attention of the defense when Pare', on his own initiative, sought out defense counsel after the jury's verdict (D.A. 2187). Pare' had been excused as an alternate juror when the jury retired for its deliberations. All of the events testified to by Pare' oc-

curred during the progress of the trial, but before submission of the case to the jury. A summary of those events follows:

Six or seven jurors were sitting in the day room at the Great Lakes Naval Station where they were sequestered.[16] Juror Gogerty, later elected foreman of the jury (D.A. 2179), crossed the room to Pare' and handed him a newspaper clipping which juror Gogerty took from his wallet. Pare' read the article and returned it (D.A. 2201).

The article, set out in full at D.A. 311, was about the case, and was headlined: *Hoffa Turned Down on 2d Acquittal Plea.* It began with:

> "James R. Hoffa, president of the Teamsters union, lost a second bid for a judgment of acquittal yesterday in his 25 million dollar fraud trial in federal District Court.
>
> "'Hoffa's attorneys first sought an acquittal two weeks ago after the government had rested its case, but the move was denied by Judge Richrad [sic] B. Austin.'"

The article went on to describe the unsuccessful argument of petitioner Hoffa's counsel in support of the rejected "second bid for a judgment of acquittal" as one made "in contending his client is innocent", and based on a contension "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith'."[17]

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[16] The jury was originally sequestered in a downtown hotel. They were later sequestered in the Great Lakes Naval Station, a military reservation 36 miles from the Courthouse. From the time of this transfer until the end of the trial, the jury spent all its free time in the military compound, where all recreation—and even dental work—was carried on under the direct supervision of federal marshals, and the general supervision of the military (D.A. 574-580; P. Ex. A. 2-3).

[17] The proceedings on the two rejected motions for judgment of acquittal had, of course, taken place out of the presence of the jury.

The article concluded with a report of the trial judge's barring from evidence of the Link letters offered by the Government to discredit the testimony of petitioner Dranow. The article's description of the letters was:

> "In one of the letters, Dranow wrote that he was sorry for the troubles and would take the blame. In the other letter, he asked for a $60-a-day payoff from co-defendants and other associates."

The letters, according to the article, were excluded by the trial judge "inasmuch as [they]tend to be prejudicial against the other defendants." The trial judge, *without connecting petitioners to the letters,* had instructed the jury to disregard the letters and all testimony concerning them (D.A. 2065-6).

Besides the newspaper article in the possession of juror Gogerty, other information reached the sequestered jury from an outside source. Juror Gogerty remarked to other jurors that petitioners Strate and Hoffa "were in cahoots in Puerto Rico". (D.A. 2199, 2905, 2190). The evidence in this conspiracy trial provided no basis for juror Gogerty's statement.[18]

Finally, according to alternate juror Pare''s testimony, various jurors during the course of the trial made many statements to other jurors concerning the trial, the evidence, and the guilt of defendants. Among such statements were the following. On two or three occasions when events in the courtroom suggested cross-purposes among the defendants, juror Bernier said: "There is no honor among thieves." (D.A. 2192, 2190). On another occasion

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[18] While the jury was sequestered at the Great Lakes Naval Station, articles appeared in the Chicago daily newspapers which concerned Hoffa, Strate, and Teamster Union problems in Puerto Rico (D.A. 316-326).

juror Doughton added: "If I had a million dollars, I sure wouldn't let Hoffa get ahold of it. Might never see it again." (D.A. 2193).

On still another day, juror Siers felt that "those guys", including petitioner Hoffa, "won't look me in the eye", and concluded that "they know their goose is cooked or at least in the frying pan." (D.A. 2193, 2190). Juror Gogerty added that "you can't tell me Hoffa didn't know about" a failure to put up debentures for a Pension Fund loan. Juror Gogerty further deduced: "Dranow now sets it up, Burris does the papers, Kovens gets the construction work. That's got to be a conspiracy somewhere." (D.A. 2193-2194, 2190). And juror Gogerty concluded that petitioner Hoffa, unlike Reuther or Meany who are "tough" but "straight" or "honest", has been in trouble right from the start." (D.A. 2194, 2190). Juror Gogerty followed up those remarks a few days later with: "These bastards live their lives robbing people, parasites"; while Juror Bernier informed his fellow jurors "we spend all our damn time here, and they just appeal this thing." (D.A. 2194-5, 2190).

All of the foregoing statements by jurors were made prior to submission of the case to the jury.

The trial judge accepted as true all of the foregoing events testified to by juror Pare', without cross-examination, impeachment, or any response by the Government (D.A. 2212, 2217). Nevertheless, he denied both a new trial and any inquiry of the jurors (D.A. 2212, 2215).

The Court of Appeals found no error because:

> "There was no evidence of any outside influence on the jury and from Pare's testimony, it appears that, for the most part, the jurors followed the Court's admonition not to discuss the case among themselves until the case was finally submitted to them for de-

cision. We think, under all of the circumstances present, that these matters brought to the attention of the trial judge after verdict were not sufficient to require an inquest by the Court or the granting of a new trial . . ." (App. A, *infra,* p. 31).

E. The Prejudice Inherent In The Joint Trial With Defendant Dranow.

From the very inception of the pre-trial proceedings, in 1963, irrational conduct by defendant Dranow was brought to the trial court's attention. At arraignment, he would not enter a plea (H.D.A. 461). On June 25, 1963, his attorney informed the Court of Dranow's complaint of a visit to him in prison by Justice Department agents requesting him to give perjured testimony at the trial. Counsel stated that Dranow "is virtually half insane" (H.D.A. 462). Even Government counsel early informed the trial court that the Government feared a conflict might arise between Dranow and his counsel (H.D.A. 463-65).

Prior to commencement of trial, on April 27, 1964, counsel informed the Court that: (1) Dranow had been unable to confer intelligently with counsel; (2) Dranow had informed them that he was not physically or mentally capable of aiding and assisting in the preparation of his defense; (3) Dranow could not speak coherently; and (4) they were of the belief that Dranow could not intelligently aid and assist counsel in the preparation of his defense. They requested that the Court have Dranow examined by doctors to determine "whether or not he is mentally capable of assisting counsel in the preparation of this case" (H.D.A. 493).

On April 28, 1964, at a conference in the Court's chambers, Dranow's statements and conduct were not only irrational but he also exhibited an unwillingness to cooperate with his counsel. He also refused to be examined

in a hospital (H.D.A. 508). The Court ruled that he would defer the examination until Dranow had filed affidavits and medical reports (Tr. 299).

On Monday, May 11, 1964, the Court advised counsel that Dranow had sent a telegram to the Court requesting that he be permitted to act as his own attorney and that he be examined by Government physicians under adequate conditions and circumstances (Doc. Ex. App. 13-14).[19] When the Court showed the telegram to counsel, the lawyers for all co-defendants asked the Court for a severance in view of Dranow's mental breakdown (Tr. 2240-2243, 2252-53). They also asked that Dranow be examined (Tr. 2258).

Dranow's counsel again told the Court "the man is mentally deranged. This man cannot understand the significance of a legal point" (Tr. 2247); and suggested that Dranow be examined (Tr. 2248). Defense counsel suggested that in view of Dranow's irrational conduct, the Court should make appropriate inquiry (Tr. 2252).

Dranow was brought into the Court's chambers where the Court asked if he desired his present counsel to continue to represent him. He answered in the affirmative (Tr. 2258-2259). The Court denied the motions for severance and mental examination (Tr. 2260; D.A. 552).

During the trial, Dranow's exchanges with the prosecutor and the trial judge made impossible serious consideration of the charges. The judge made a derogatory remark about Dranow's checks being "exchanged and floated and bounced around the country," and stated that Dranow

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[19] "Doc. Ex. App." references are to the document exhibit appendix as printed for the Court of Appeals in the first appeal, and on file with this Court.

would need help to try to straighten "it" out (D.A. 1870). There were other remarks of this type by the trial judge (D.A. 1894, 1907).

Dranow's conduct during the trial was irrational. He had frequent clashes with spectators and counsel on both sides (Tr. 14135-40, 14326, 14337, 14339, 14342-43, 14373-74). He was belligerant, discourteous, vulgar, non-responsive, and his statements during his testimony were frequently incoherent (Tr. 14125, 14132, 14224, 14295-96, 14311, 14315, 14332, 14333, 14337, 14340, 14344, 14346, 14381, 14385, 14402, 14659, 14662).

Additional evidence on Dranow's competency was introduced at the eavesdrop hearing. Medical reports from the medical center for federal prisoners in Springfield, Missouri made it abundantly clear that Dranow was mentally and emotionally disturbed, suffering from severe depression and had schizophrenia of the paranoid type (Def. H. Ex. 1-A, 1-B, 1-C, 1-D; H.D.A. 190-192, 194-200, 758).

Three eminent psychiatrists testified prior to the commencement of the eavesdrop hearing that they found Dranow to be severely depressed and incompetent to participate in the hearing or confer with his counsel (H.D.A. 763-64, 775, 779). One of the psychiatrists added that there was sufficient evidence for him to arrive at a medical opinion that Dranow "has suffered paranoid delusions in the past" (H.D.A. 779).

Dranow testified at trial against the advice of his counsel (Tr. 14117-118). When he took the stand, Government counsel asked the Court to admonish him not to refer to prior convictions of any defendants (Tr. 14114). Counsel for co-defendants renewed their motion for a severance (Tr. 14116-18). Additionally a further motion was made to have Dranow examined, but the Court denied both motions (Tr. 14117).

During direct examination, Dranow stated that he was under life "sentence" (Tr. 14297); that "if it is up to Mr. Kennedy to leave me out of jail, I will be there until I die" (Tr. 14297); and that he had "been convicted three times on the same kind of monkey business" (Tr. 14295). He engaged in frequent outbursts. When asked whether he had any connection with the Teamsters Pension Fund, he replied, "Yes. I'm their representative in the prison. If the prison wants a loan, I will recommend it." (Tr. 14385-86). He stated to the prosecutor, on cross-examination, "It's about time you got wise. Say a little more and I'll mutilate you." (Tr. 14663). He, also in the presence of the jury, accused Government counsel of lying (Tr. 14661), and of suppressing evidence (Tr. 14659).

During Dranow's testimony, the motions of the other defendants for a severance from Dranow and mistrial were renewed and denied (Tr. 14376, 14386, 14664).

The Court of Appeals concluded that it was not improper to deny requests for severance from Dranow (App. A; *infra*, p. 18.)

F. Impeachment Of An Accused Through The Use Of A Non-Final Conviction For A Subsequent, Unrelated, But Highly Prejudicial Offense.

Just before presentation of petitioner's case, defense counsel sought a ruling from the trial judge on whether the Government would be permitted in cross-examination of petitioner Hoffa as a defense witness to bring out a jury tampering conviction which was then on appeal to the Sixth Circuit Court of Appeals (Tr. 13587-13590; G.A. 187-189). Adversely to petitioners' contentions, the trial judge ruled that he would permit such cross-examination (Tr. 13589-90; 13711; G.A. 189-190). Petitioner Hoffa did take the stand as a witness for the defense; and, in ac-

cordance with the trial judge's prior adverse ruling, he did, on cross-examination, admit the fact of the jury-tampering conviction then on appeal to the Sixth Circuit Court of Appeals (D.A. 2001).

Thereafter, defense counsel unsuccessfully objected to the trial judge's instruction concerning the jury-tampering conviction "consistent with the objection . . . originally made about its admissibility, since it was on appeal" (D.A. 2166; Tr. 16561-2). The prosecutor in his argument to the jury made several prejudicial references to petitioner Hoffa as "a jury tamperer" unworthy of belief (D.A. 2092-4).

The jury-tampering conviction used to impeach petitioner Hoffa related to events alleged to have occurred in the fall of 1962 when he was on trial in the "Test Fleet case".[20] All of the substantive offenses and the material facts of the conspiracy in the present proceeding are charged to have occurred from 1958 to 1961, or from nine months to several years prior to the events of the jury-tampering charge (D.A. 4177). Nevertheless, the Government succeeded in delaying the trial below until completion of the jury-tampering trial.

The indictment for jury tampering was filed in May, 1963, a few weeks before the filing of the present indictment in June, 1963. However, the present indictment was in large part a successor indictment to those filed against petitioner Hoffa in the Federal Court at Orlando, Florida, almost three years earlier in December 7, 1960 and Octo-

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[20] See generally this Court's opinion in *Hoffa* v. *United States*, 385 U.S. 293.

ber 11, 1961.[21] Efforts by petitioner Hoffa in 1962 and 1963 to secure trial or dismissal of the Orlando predecessor indictments were resisted by the Government until the filing of the jury-tampering indictment and the present indictment. The Government then secured dismissal of the Orlando indictment by reason of the filing of the present indictment (D.A. 345-347).

At arraignment in the instant case, all petitioners requested an immediate trial, and agreed to waive all pretrial motions. Thereafter, petitioners repeatedly moved for an immediate trial, but the Government successfully resisted all of these efforts, although only petitioner Hoffa, of these petitioners, was charged in the jury-tampering case (D.A. 342, 343, 344-346, 348-351, 364-368).

G. The Removal Of A Juror Without Ascertaining Whether He Had Become Unable, Or Disqualified, To Perform His Duties.

After the close of the Government's final argument, the trial court advised petitioners that the 92-year old mother of juror Lee had fallen, broken her hip, and had major surgery the day before. The juror was told that his mother came out of the operation very well. He did not request discharge from the jury. (D.A. 2106). The doctor advised the marshal that the mother was doing very well, but that due to her age she could suffer a relapse at any time. Although there was no actual way of telling, the doctor doubted that she would ultimately leave the hospital alive. (Tr. 16404). But he did not expect her to die in the immediate future. (D.A. 2106).

The Court advised petitioners that unless they unanimously agreed to proceed with eleven jurors in the event Lee's mother died, he would substitute an alternate before the jury began its deliberations. (D.A. 2094, 2101).

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[21] This view was also held by Judge Austin who related the indictment at issue back to the prior indictments. (App. E, *infra*, p. 79).

Petitioners declined so to agree, and requested that inquiry be made of the juror as to the state of his feelings in the matter. They objected to his removal without such inquiry of him. The Court refused inquiry, and replaced the juror. (D.A. 2102-03). The juror's mother did not die before the jury reached its verdict.

H. Multiple Schemes And Conspiracies, And Irrelevant Transactions Presented As One Single Scheme And Conspiracy To Defraud.

The majority and dissenting opinions of the Court of Appeals agreed that the common object or design of the claimed scheme and conspiracy was to obtain money for the purpose of relieving the financial distress of Sun Valley, Inc., a real estate development company, for petitioner Hoffa's benefit (App. A, *infra,* pp. 12, 50). This conclusion was adopted by this Court in its *per curiam* opinion remanding the case to the District Court for further proceedings. 387 U.S. 231, 232.

The evidence, more fully set forth in the dissenting opinion below (App. A, *infra,* pp. 46-70), may be briefly summarized as follows:

Sun Valley, Inc. On July 2, 1958, the beginning of the alleged scheme and conspiracy, a Florida bank was holding $400,000 of the funds of the Detroit local union of which Hoffa was president. The bank claimed that these funds were security for a loan to Sun Valley, Inc. At this time, Sun Valley was in financial distress and undergoing reorganization proceedings (D.A. 556, 588, 589, 597, 601, 602). The Government claimed that prior to the Sun Valley reorganization, Hoffa had an interest in it (See *e.g.*, D.A. 44, 619, 1979-1982). Petitioners Dranow and Burris, together with others not claimed to be conspirators, took steps to reorganize and refinance Sun Valley

(D.A. 1403, 1405, 1554-55). The Government adduced evidence that Kovens, Hyman and Strate invested in or contributed money to this refinancing (D.A. 894-95, 1084, 1408, 1414; Govt. Ex. 153-8, 494). The Government claimed that $100,000 of the fees and other benefits which Dranow and Burris allegedly received for helping to obtain the Everglades, Key West, Fontainebleau, First Berkeley and other loans was a portion of the $550,000 which was provided to refinance Sun Valley. By June 27, 1960, all of Sun Valley's obligations had been paid, the trusteeship dissolved, and Sun Valley had been succeeded by Union Land and Home Company. Furthermore, the Detroit local union had been repaid its $400,000 by the Florida National Bank (D.A. 1401-02; Govt. Ex. 22).

The following is a brief description of the individual loans alleged in the indictment and upon which evidence was adduced below:

First Everglades Loan. The Fund loaned Vaughan B. Connelly 3.3 million dollars in January, 1959 to remodel the Everglades Hotel in Miami, Florida (D.A. 688, 690, 802-803). Dranow was alleged to have received a finder's fee for obtaining this loan (D.A. 629, 658-59). Burris assisted in preparing the application for the loan (D.A. 629). Kovens was the contractor (D.A. 624-26). The Government failed to prove material misrepresentations to, or fraud on, the Fund in the obtaining of this loan (App. A, *infra,* pp. 53-54). The indictment did not contain a substantive count based upon this loan.

Second Everglades Loan. A second loan of one million dollars was made to the Everglades Hotel in July, 1959. Dranow and Burris assisted with the application for the loan (D.A. 663, 667). Kovens' only connection with this loan was as the contractor for the project. There was no

allegation or evidence of direct misrepresentations to or fraud on the Fund in the obtaining of this loan (App. A, *infra,* p. 54). Petitioner Strate and defendant Hyman had no connection whatsoever with either loan to the Everglades. There was no evidence that the proceeds of either of these loans were used in refinancing Sun Valley (App. A, *infra,* p. 54). Contrary to the majority opinion below App. A, *infra,* p. 10), there was no evidence that the $15,000 invested by Connelly in Sun Valley came from Fund loan proceeds (G.A. 165).

First Fontainebleau Loan. In July, 1959, the Pension Fund loaned the Pelican State Hotel Corporation, owned in part by petitioner Strate, $1,350,000 to enlarge the Fontainebleau Hotel in New Orleans, Louisiana (D.A. 1063-64, 1066). Defendant Dranow assisted with the application for the loan, and the Government adduced evidence that he received a finder's fee for his efforts (D.A. 1062, 1067-68, 1103-04). There was no evidence of any material misrepresentations to, or fraud on, the Fund in the obtaining of this loan.

Second Fontainebleau Loan. An additional $2,325,000 was loaned to the hotel in February, 1960 (D.A. 1078, 1518). Burris and Dranow assisted in preparing the application for this loan, and the Government adduced evidence that Dranow received a finder's fee (D.A. 1069). There was also evidence of misrepresentations to the Fund in connection with this loan. (D.A. 1075, 1155-56).

Third Fontainebleau Loan. A third loan of $500,000 was granted in December, 1960 (G.A. 127). Again, Burris and Dranow assisted in the preparation of the application (D.A. 1068-1072). There was evidence of misrepresentations. The loan was granted after the rehabilitation of Sun Valley (App. A. *infra,* p. 55; G.A. 127).

Fourth Fontainebleau Loan. A fourth loan of $500,000 was made to the hotel in March, 1961 (G.A. 127). Burris and Dranow assisted in preparing the application for the loan (D.A. 1068-1072), but there was no evidence of any misrepresentations to, or fraud on, the Fund in connection with the loan. The loan was granted almost one year after Sun Valley had been rehabilitated. The indictment did not contain a substantive count based upon this transaction.

Kovens and Hyman were not connected in any way with any of the four Fontainebleau loans. (App. A, *infra,* p. 55).

First Key West Loan. In July, 1959, the Pension Fund loaned $875,000 to the Key West Foundation Company, owned partially by petitioner Hyman. Burris assisted in obtaining the loan (D.A. 1683). The sum of $275,000 was to be used to pay off an existing mortgage on land owned by the company and to construct a small shopping center. No limitation was placed on the use of the balance of the proceeds. (Tr. 11266-11271). The District Court directed a verdict of acquittal for the defendants on the substantive count relating to this loan for failure to prove any material misrepresentation (D.A. 878, 1773). The evidence, however, was not stricken.

Second Key West Loan. A $400,000 loan to Key West was approved in June, 1960 for the remodeling of the Poinciana Apartments (G.A. 132-34; D.A. 1497). The proceeds of this loan were not disbursed until after Sun Valley had been rehabilitated (G.A. 135-38; Govt. Ex. 410; App. A, *infra,* p. 57). Kovens and Strate were not connected with these two loans in any manner.

LaConcha-Casa Marina Loans. In January, 1962, the Fund loaned Hyman a total of $650,000 for the purchase of the LaConcha and Casa Marina Hotels in Key West, Florida (G.A. 297-303, 304-310). No finder's fees were paid in connection with these loans. The proceeds were disbursed

almost two years after Sun Valley had been rehabilitated The indictment did not allege any misrepresentation to the Fund in obtaining these loans. The Government, however, adduced evidence of claimed misrepresentations (D.A. 882-84; G.A. 300, 307). Kovens, Strate and Dranow were not connected with these loans. (App. A, *infra,* p. 57).

The Initial First Berkeley Loan. In January, 1960, the Pension Fund loaned the First Berkeley Corporation, owned by Burris, $266,000 to acquire the Beverly-Wilshire Health Club in Los Angeles (D.A. 1562). The Government conceded at trial that no misrepresentations were made in connection with this loan (Tr. 10627-28). No finder's fees were paid, and no connection with Sun Valley was shown. (App. A, *infra,* pp. 58-59).

The Second First Berkeley Loan. In March, 1960, the Fund granted an application for an additional $2,966,000 loan to purchase the Cornell Buildings in Los Angeles (G.A. 271-72). The Government adduced evidence of misrepresentation (D.A. 1223, 1384-85, 1419). The evidence did not connect this loan with the rehabilitation of Sun Valley.

The Third First Berkeley Loan. This loan of $300,000 for improvements to the Cornell Buildings was disbursed in April, 1961, almost one year after the rehabilitation of Sun Valley (D.A. 799). There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan. The District Court directed a verdict of acquittal on the two substantive counts relating to this loan (D.A. 39). The evidence with respect thereto was not stricken. (App. A, *infra,* p. 59).

Hyman, Strate and Kovens were not connected with the three First Berkeley loans. However, Burris pledged some stock which belonged to Kovens, as collateral for the second loan (G.A. 315, 351).

The First Good Samaritan Loan. In September, 1959, the Fund granted a loan to Good Samaritan Hospital, Inc., owned by one Burt Sager, to finance the construction of a hospital (D.A. 1303-05; Govt. Ex. 181-17). Proceeds of the loan were not disbursed until November, 1960 (Govt. Ex. 181-15, 182-3). Burris assisted Sager's accountant in preparing the application for the loan (D.A. 1303-04). During the trial the Government conceded that all of the proceeds of this loan, as well as of the second loan, were properly used to build the hospital (Tr. 15295-96, 15299). The evidence as to materiality of alleged misrepresentations was equivocal (App. A, *infra,* p. 60).

The Second Good Samaritan Loan. A second loan of $500,000 was granted to Good Samaritan in June, 1961. (Govt. Ex. 178-26). There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan App. A, *infra,* p. 60).

Strate, Hyman and Dranow had no connection with the Good Samaritan loans.

4306 Duncan Corp. Loan. In December, 1959, the Fund loaned $849,000 to the 4306 Duncan Corp., which was owned by Fred Strecker, a Pension Fund Trustee. Although the Government adduced evidence of misrepresentations (D.A. 1336-49), the loan had no relation to Sun Valley, and no fees were paid in connection with it. No petitioner received any benefit from it. Dranow and Burris assisted Strecker in obtaining this loan (D.A. 1339-41, 1343-45, 1367-73). Kovens, Strate and Hyman had no connection with with it (App. A, *infra,* pp. 61-62).

The Miracle Plaza Loan. In June, 1960, the Fund granted a loan of $1,100,000 to refinance mortgages on the Miracle Plaza Shopping Center in Vero Beach, Florida (D.A. 756). Petitioner Kovens was associated with Miracle Plaza. There was no evidence of any misrepresentation to, or fraud on, the Fund in the obtaining of this

loan, nor was it linked to Sun Valley. The substantive count relating to this loan was dismissed for failure to prove fraud (App. A, *infra,* p. 65). The evidence was not stricken. No other petitioner was shown to be connected with this loan.

The Miami International Airport Hotel and the Birmingham Airport Motel Loans. In 1959, the Fund loaned $2,000,000 to Airport Hotel, Inc. for the construction of the Miami International Airport Hotel. In 1961, a second loan of $1,000,000 was made to the Birmingham Airport Motel in Birmingham. A Miami accountant, George Simon, was involved in these ventures (D.A. 1179-80, 1182-85). Burris assisted Simon in obtaining each loan, for which he received a fee (D.A. 1181-82, 1182-85). There was no evidence of any misrepresentation to, or fraud on, the Fund in conjunction with these loans, or of any relationship with Sun Valley. Strate, Hyman and Kovens were not connected with the loans. (App. A, *infra,* pp. 66-67).

The Club 300 Loan. The Fund loaned $900,000 to Club 300 in 1961 to finance a motel and bowling alley (D.A. 1392, 1411). There was no evidence of any misrepresentation to, or fraud on, the Fund in connection with this loan. The Government dismissed the substantive count relating to this loan at the conclusion of the case for failure to prove fraud (App. A, *infra,* p. 67). There was no relationship between this loan and Sun Valley. Kovens, Strate and Hyman were not connected with this loan.

The Causeway Inn Loans. Loans of $1,500,000 and $350,000 were granted in late 1960 and 1961, respectively, to construct a motel in Tampa (D.A. 1295, 1384, 1389). In January, 1963, a third loan in the amount of $1,000,000 was granted for the expansion of the motel (D.A. 1540-50). The Court entered a judgment of acquittal on the substantive count relating to the first two loans for failure to

prove fraud (App. A, *infra,* p. 68). No substantive count related to the third loan. There was no evidence of any misrepresentation to, or fraud on, the Fund in obtaining any of these loans. Burris received a fee for assisting in obtaining these loans (D.A. 1390-91; Govt. Ex. 672, 673). Kovens' only connnection with the loan was that he was hired as the contractor after the loans were granted (D.A. 1388). Strate and Hyman were not connected with these loans in any manner.

Petitioner Hoffa was one of 16 trustees of the Pension Fund. As such, he had one vote in regard to each loan application. It was only as such trustee that petitioner Hoffa functioned in the matters involved herein. He had no interest in any of the business ventures to which the Fund made loans. Petitioner Weinblatt was not shown to be connected with any of the loans. Dranow maintained some of his bank accounts in Weinblatt's name. The proof of that fact was the only evidence relating to Weinblatt.

There was no evidence that the Fund lost any money on any of the loans. There was a default and foreclosure only on the Everglades loans (D.A. 676). All of the fees mentioned in the evidence were paid by the recipients of the loans; none was paid by the Fund itself.

The convictions were affirmed below by a two-to-one decision. The majority held: (1) "The Government had the burden to prove that the defendants conspired to and did devise a scheme to defraud the Pension Fund by submitting false and fraudulent representations and concealing material facts from the Pension Fund trustees and staff in order to obtain Pension Fund loans"; (2) ". . . the central purpose of the conspiracy and scheme was to 'bail out' Sun Valley"; (3) "the burden also rested on the Government to demonstrate that the central object of the conspiracy was to obtain money for the purpose of 'bailing out' Sun Valley . . ."; and (4) ". . . the proof in

this case was sufficient for the jury to find that a single conspiracy did exist and that each defendant was a knowing member of it . . .". (App. A, *infra,* pp. 11-12).

However, the majority did not discuss at all the petitioners' contentions that much of the evidence adduced by the Government was irrelevant to the charge of fraud, or to the common object of the scheme and conspiracy charged, or to both. Further, the majority did not undertake to demonstrate how the twenty-one separate loans transactions proved one single scheme and conspiracy among all of the petitioners.

The dissenting judge devoted twenty pages of his opinion to a consideration of these issues. The dissent concluded: (1) "The preceding analysis relating to several of the loan transactions charged to be part of a single conspiracy demonstrates that no common design bound all of the defendants together"; (2) There were "multiple subsidiary conspiracies . . ."; (3) ". . . the prosecution was allowed to proceed on the theory that a generic description of the substantive crime which the defendants were alleged to have conspired to commit was a sufficient common objective so as to make each defendant a co-defendant with the others named in the indictment"; (4) ". . . a great amount of irrelevant, immaterial evidence was admitted against the defendants"; (5) ". . . a substantial number of the loan transactions as to which evidence was offered and received had no logical tendency to prove either the existence or the execution of the scheme to defraud the Pension Fund charged in the indictment, or for that matter, any scheme to defraud the Pension Fund"; and (6) ". . . an intense study of the record convinces me that this prosecution was designed to charge a sprawling, amorphous scheme and conspiracy in order to allow the presentation of a series of confusing, complex transactions and to abet the introduction of a mass of immaterial, prejudicial evidence." (App. A, *infra,* pp. 62-67).

REASONS FOR GRANTING THE WRIT

I.

Government's Knowledge Of Facts Gained Through Illegal Electronic Eavesdrop Was Used To Tailor Its Evidence To Destroy The Defense.

Following an ever increasing number of governmental confessions of illegal electronic eavesdropping, *Black* v. *United States*, 385 U.S. 26; *Schipani* v. *United States*, 385 U.S. 372; *O'Brien* v. *United States*, 386 U.S. 345, requiring reversals of the convictions below, this Court in this case ordered, for the first time, that the District Court hold an evidentiary hearing to determine whether such governmental illegality "tainted" the convictions, 387 U.S. 231. This case thus presents for this Court's review, again for the first time, the results of such a hearing. It also presents the unique issue of whether the convictions are "tainted" when the use made of such illegality was to intercept an otherwise unknown defense of the accused and to consequently fashion the government's case so as to wither the thrust of that defense.

Curiously, the Government in its admission to this Court regarding the illegal overhearing chose not to submit to this Court either the log of the intercepted conversation or either of the two summaries thereof. Rather, it chose to submit only an innocuous one paragraph resume' of the entire conversation (Br. in Opp. 64-65). Until now, this Court was uninformed of the marginal notations and impressions placed on the summary by the Government's prosecutors below and was uninformed that a significant Government witness in the trial had actually prepared the summaries of the eavesdrop. Indeed, the facts of the actual use of the contents of the interception were withheld

from this Court as was the fact that nine *other* conversations of defendants were illegally intercepted by the Government. Also, the Government chose to conceal a number of intercepted conversations of defense counsel.

This cavalier attitude of the Government cries out for the application of this Court's supervisory powers to delineate what safeguards are to be established to prevent the erosion of the constitutional rights of persons accused of crime by those sworn to enforce the law and to forestall future piecemeal disclosures of illegal Government activities, which separately could have the appearance of inconsequentiality but collectively affect substantial constitutional rights.

The majority of the Court of Appeals found that the convictions were not tainted by the illegal evidence (App. F, *infra,* p. 96). In apparent support of this conclusion, the opinion asserts that the "detailed" indictment was returned six months before the overhearing, spells "out in detail the roles played by each of the defendants", mentions all the proven loan transactions, and thus such particularity could not "have been obtained from a cryptic half-hour conversation which occurred six months after the indictment had been returned" (App. F, *infra,* p. 97). In addition, the Court below apparently urges that in order to "taint", the overhearing must be "the product of [an] investigation conducted as to [a] defendant in this case" (App. F, *infra,* pp. 97-98).

These criteria, we submit, cannot be the standards by which "taint" is to be viewed. The use to which the overhearing is put need not have any relation to the formulation of the indictment. Moreover, to urge that the overhearing must be directed to the defendant in the case emasculates the import of the Fourth Amendment and the

due process clause of the Fifth Amendment. Such a position promulgates the doctrine that evidence discovered incidental to an illegal search directed against a third party, but which *belongs* to the defendant, is nevertheless admissible evidence. Certainly, this Court cannot permit such an opinion to sweep away the substantial authority to the contrary. *Jones* v. *United States,* 362 U.S. 257; *Mancusi* v. *Deforte,* 392 U.S. 364; *Simmons* v. *United States,* 390 U.S. 377.

The eavesdrop also bared to the prosecution additional theories of defense, which could be evaluated and accepted or rejected in tailoring the prosecution, in light of facts already known. For instance, the summary related that Sigelbaum knew an attorney named Bill Manheight who would be a good defense witness and that Manheight would testify he met Burris in connection with a Fund loan, that he had a difficult time getting a loan, and that he had to put up additional collateral. With regard to such contemplated defense, trial prosecutor Poretz wrote upon the summary of the log of the interception, "such testimony would not be admissible." (See *supra,* p. 19).

That portion of the summary which referred to Burris' statements that if the witness in this case spoke the truth they would say there was no conspiracy, that no one was promised anything, that the loans had to be approved before a disinterested board, and that the properties were all properly appraised with extra collateral required in many cases, was considered significant by the Government. This is evidenced by the fact that someone penciled brackets around this portion of the summary. (See *supra,* p. 19). The Government may have been aware of these safeguards; yet through the eavesdrop, its suspicions that this defense would in fact be interposed at the trial were confirmed.

Moreover, the overhearing disclosed a proposed defense that defendant Hyman, upon first obtaining pension fund loan proceeds, used them differently than their represented purpose, but that ultimately they were so used. The summary of the interception reflects this information with italicized references. This summary bears notations and comments in the margin of the document placed there by Government attorneys and particularly with the handwritten notation, "Does this check out?"

FBI Agent Connors who had prepared the summary from the eavesdropping log had prepared accounting analyses of the Hyman borrowings and testified to them at trial. As a result of his consultations with the prosecutors, he had originally prepared those schedules to encompass a period of time which would disclose that Hyman had ultimately used the loan proceeds for the purposes for which they were obtained. Subsequently, when the nature of the defense became known through the eavesdrop, Government trial counsel instructed him to exclude from his previously prepared accounting analysis the subsequent expenditure of the funds. In addition, his prior worksheets were destroyed.

The dissent below unequivocally maintained the foregoing circumstances established that when the Government gained knowledge of the proposed defense, "Agent Connors, pursuant to the directions of the Government prosecutors, tailored his accounting summary and his testimony. Thus, the Government attempted to forestall or destroy the defense indicated in the overheard conversation. . . ."(App. F, *infra,* p. 112). The majority said no more than "taint" was non-existent because of the preexistence of the detailed indictment and because the overhearing was not directed against any defendant. (App. F, *infra,* pp. 96-98).

The importance for this Court to enunciate the proper standards for "taint" is unmistakable. Should this Court fail to undertake a review of this issue, the effective principle of the Seventh Circuit's decision would remain the law in this area, i.e., information learned through an illegally overheard conversation of the defendant and used by the Government to "tailor" its case to forestall or destroy a defense disclosed thereby, is not "taint" affecting the convictions. This cannot and should not remain the law. This Court should both exercise its supervisory powers for the effective administration of justice as well as to establish the appropriate standards for determining "taint" from illegal electronic eavesdropping by granting the petition for certiorari in this case.

II.

The Unilateral Usurpation by the Government of the Court's Function of Determining Whether Documents Are Producible Under 18 U.S.C. §3500.

But for the remand and hearing ordered by this Court, petitioners would never have discovered the fact that the Government had withheld at trial three vital and material documents clearly required to be produced under the disclosure provisions of 18 U.S.C. §3500. The circumstances surrounding this huggermuggery clearly reveal that the concealment was not inadvertent, but an intentional deception in which the prime architect was Agent Connors, who figured so prominently in the use of the eavesdropped conversation and the attendant tailoring of the prosecution. At trial, Connors emphatically denied making any reports during his investigation (H.D.A. 594). Persistent defense efforts to learn of the existence of such reports at trial were fruitless (H.D.A. 594, 598). The plain fact is, however, as the dissenting opinion of the Court of Ap-

peals pointed out, that "agent Connors lied on the witness stand . . ." (App. F, *infra,* p. 116). Not until three years later, at the hearing ordered by this Court, was it disclosed that Connors had in fact prepared three reports.

These reports which were concealed from the Court, the jury, and the defense were directly relevant to this case. Two of the reports were Connors' summaries of this electronically overheard Burris-Sigelbaum conversation. The third related to his September, 1963 conference with the trial prosecutors and set out the type of accounting summaries which Connors was to prepare for use at the trial. (H.D.A. 221-224). It specifically stated that a decision had been made that his trial charts for the Key West project were to include disbursements through April 30, 1961.

None of these reports were submitted by the Government to the District Court during the trial for a determination as to whether they came within the purview of section 3500, so as to require delivery of the same to the defense. The Government thus clearly, in an *ex parte* manner unilaterally determined, without any judicial supervision, that the documents did not constitute statements within the meaning of the statute, and, that in any event, they did not relate to the matters to which the witness had testified on direct examination. The decision of the majority of the Court of Appeals, in condoning the Government's unilateral usurpation of the trial Court's function, is in conflict with this Court's decisions in *Rosenberg* v. *United States,* 360 U.S. 367 and *Palermo* v. *United States,* 360 U.S. 343, and with the decisions of other Courts of Appeal in *Bary* v. *United States,* 10 Cir., 292 F. 2d 53, and *Duncan* v. *United States,* D.C. Cir., 379 F. 2d 148; *cf., Kolod* v. *United States,* 390 U.S. 136, where this Court held Government's *ex parte* determination of relevancy was insufficient.

Rosenberg and *Palermo* hold that the District Court and not the Government must determine whether a statement is producible. This Court stated in *Palermo* that when it is doubtful whether a particular document or report must be submitted to the defense, the document should be submitted to the trial judge for *in camera* inspection, and that "any other procedure would be destructive of the statutory purpose." 360 U.S. at 354. The Jencks Act certainly did not grant to the Government the power to decide unilaterally whether a particular report of a Government witness is a statement within the language of the statute, and whether it is material to the testimony of the witness. *Bary* v. *United States, supra.* See also, *Campbell* v. *United States,* 365 U.S. 85, 107, *United States* v. *Berry,* 7 Cir., 277 F. 2d 826, *United States* v. *Sheer,* 7 Cir., 278 F. 2d 65, *Augenblick* v. *United States,* Ct. Cl., 377 F. 2d 586, 603.

The decision of the majority of the Court of Appeals, that the reports did not relate to Connors' accounting testimony, and that there was not a statement within the requirements of 18 U.S.C. §3500, is clearly erroneous. Connors testified at trial as to expenditures made by the Key West Foundation, and stated that his trial charts were intended to reflect "what was truly spent for building improvement." (H.D.A. 587). Certainly, the October 8, 1963 memorandum relating to the Key West expenditures which the prosecutors had instructed Connors to insert in his trial charts, was clearly relevant to his trial testimony. Similarly, his summary reports of the Burris-Sigelbaum conversation, relating to the manner in which Key West expenditures had been made by co-defendant Hyman, were obviously pertinent to the very crux of his testimony. Unmistakably, had the Government submitted such reports and memoranda to the defense, the cross-

examination of Connors with regard to his earlier preparation of charts under instruction of trial counsel (the October 8, 1963 report), and his subsequent destruction of these charts and the preparation of new charts again under the instructions of trial counsel but after preparation and distribution of his summary reports of the eavesdropped conversation, would have been devastating. His testimony would have been clearly impeached.

Moreover, the indictment charged that the purpose of the conspiracy was that the money borrowed from the Pension Fund was to be used for purposes other than those represented to the Fund at the time of borrowing. (See Indictment, par. 11(f); D.A. 53-54). Since Hyman did spend the money as represented to the Fund, but in 1961 rather than 1960, the Court of Appeals erred in its decision that the manner in which "Hyman spent the money in 1961 is irrelevant".

In any event, an appellate court "should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg* v. *United States,* 360 U.S. at 371.

While every violation of the Jencks Act does not, in and of itself necessarily amount to a violation of due process, *Scales* v. *United States,* 367 U.S. 203, 257-58, nevertheless, where, as here, the statutory violation by the government's decision to withhold the documents so fatally infected the proceedings, petitioners were unconstitutionally deprived of a fair trial. This Court has held that the demands of the Due Process Clause must be carefully weighed when an accused in a criminal trial seeks evidence within the prosecution's control which is important to his defense. See, *Brady* v. *Maryland,* 373 U.S.

83, 87; *United States* v. *Reynolds,* 345 U.S. 1, 6; *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462, 469. This constitutional inquiry is integral to our system under which the Government, which prosecutes an accused, also shares the responsibility of assuming that justice is done. *Jencks* v. *United States,* 353 U.S. 657, 671.

In *Jencks* this Court held that "justice requires" that defendants at a criminal trial obtain prior statements of a witness which relate to his testimony, 353 U.S. at 689. The deliberate withholding of material intrinsic to the impeachment of a critical government witness so seriously prejudiced the defendants as to raise the prosecution's refusal to afford examination of the documents by the court to a violation of constitutional demands. Cf., Mr. Justice Brennan's concurring opinion in *Palermo* v. *United States,* 360 U.S. at 362-63. By reason of the Government's intentional deception in withholding not only from the defense but, from the Court as well, all knowledge of these crucial documents, and by reason of the Court of Appeals' clear departure from established interpretations of the Jencks Act, this Court should review the judgments here under consideration.

III.

Government Suppression of Evidence Favorable To the Defense.

The Court of Appeal's decision advances a new interpretation and application of this Court's principle enunciated in *Brady* v. *Maryland,* 373 U.S. 83. For the first time, a Court of Appeals holds that the right to due process as therein viewed, does not require reversal where the prosecution has suppressed evidence favorable to the accused, only because matters "were not used at the trial" and because "they did not lead to any other evidence which

was used at the trial." (App. F, *infra* p. 100) This new and unique rule, by its very terms, permits and sanctions the government's suppression of evidence favorable to the accused, since such "favorable" evidence would obviously not be used by the prosecution at trial and would not necessarily lead to other evidence *used* at trial.

By its very terms, *Brady's* principle pertaining to suppressed favorable evidence obviates matters actually used at the trial since they would not be suppressed. Yet, the Court of Appeals would insist on the use of material at trial as a prerequisite to the application of *Brady*. This holding is completely contrary to all existing judicial views interpreting the scope of the due process clause of the Fifth Amendment. *Giles* v. *Maryland,* 386 U.S. 66; *Guerrero* v. *Bets,* 5 Cir., 384 F. 2d 886; *Barbee* v. *Maryland,* 4 Cir., 331 F. 2d 842; *United States* v. *Poole,* 7 Cir., 379 F. 2d 645.

The *Brady* decision is the culmination of a series of cases in which this Court has proscribed the active suppression of exculpating or favorable evidence, *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Pyle* v. *Kansas,* 317 U.S. 213; *Mooney* v. *Holohan,* 294 U.S. 103, for the right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor.

The decision of the Seventh Circuit, however, would effectively foreclose the application of *Brady* to impeaching materials, since they would not be used at trial by the prosecution. Yet, it would otherwise seem clear that this Court's interpretation of due process detailed in *Brady* applies to evidence which is materially favorable to the accused either as direct or impeaching evidence. See, *Williams* v. *Dutton,* 5 Cir., 400 F. 2d 797, 800. Furthermore, Mr. Justice Fortas in his concurring opinion in *Giles* v. *Maryland,* 386 U.S. 66, 100 indicated that the prohibition against the prosecution's suppression should apply

"regardless of whether it relates to testimony which the State has caused to be given at the trial".

The government had unquestionably withheld from the defense at trial the log of the eavesdropped conversation and the two summaries of the log prepared by F.B.I. agent Connors. The sole and exclusive basis for the Court of Appeal's denial of the application of *Brady* v. *Maryland*, *supra* is their conclusion that the logs and summaries were not used at trial and did not lead to other evidence used at the trial. That the contents thereof did in fact contain information material to the guilt (or lack thereof) can hardly be disputed (see, *supra* pp. 58, 60-63). But the Court of Appeals never reached that issue and thereby established a new and totally unwarranted engraftment upon the *Brady* doctrine.

It can hardly be doubted that the government's suppression affected the defendants' Constitutional rights. As Judge Swygert said in his dissent below.

> ". . . the wilful suppression of these reports by the Government, standing alone, would seem to lead to the conclusion that the defendants' due process rights were violated. This conclusion is strengthened when the fact that agent Connors lied on the witness stand is also considered. Although agent Connors emphatically denied at the trial that he had made any reports during his investigation, he had in fact prepared and circulated the three reports in question, as he admitted at the hearing." (App. F, *infra* pp. 115-116)

Unless this petition is granted, the opinion of the Seventh Circuit will stand as authority for a principle which thoroughly and totally emasculates this Court's interpretation of the due process clause of the Fifth Amendment. This case offers the opportunity to re-establish and affirm the principle that wilful governmental suppression of evidence material to the guilt or innocence of the accused shall not be countenanced.

IV.

The Principle of Chapman v. California Should Not Be Amended to Permit the Test of a Mere Prima Facie Showing That an Illegal Electronic Eavesdrop of Defendants' Conversations Did Not Taint Their Convictions.

Following this Court's remand to the District Court for a determination of whether "the conviction of any of the petitioners was tainted" (App. D., *infra*, p. 76), the district judge undertook to define "the fence lines" of the hearing (H.D.A. 797). He ruled that the government had the burden of showing that no tainted evidence "was relevant to the conviction" (H.D.A. 793) and that such burden could be met by a *prima facie* establishment that the government had prior knowledge of the facts contained in the eavesdrop and "that there were no other electronic trespasses which aided in the conviction in this case" (H.D.A. 797). Based exclusively upon his imposition of the *prima facie* test of the government's proof he found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained" *United States* v. *Hoffa*, 273 F. Supp. 141, 147 (N.D. Ill.).

The Court of Appeals acknowledged the District Court's use of this test, and in apparent acceptance agreed with the conclusion based upon the *prima facie* criterion that the convictions were not "tainted" (App. F., *infra*, pp. 93, 96).

There can be no doubt that the foundation stone of this Court's remand was the evaluation of an admitted federal constitutional infraction upon the rights of the defendants. While it is true that some constitutional errors may, in the setting of a particular case, be so unimportant and insignificant that they be deemed harmless and not require the automatic reversal of the conviction, yet this Court has stated "before a federal constitutional error can be held

harmless, the Court must be able to declare a belief that it was harmless *beyond a reasonable doubt,*" *Chapman* v. *California,* 386 U.S. 18, 24 (emphasis added).

The principle of *Chapman* v. *California* has as equal an application to this admitted Fourth Amendment violation, where the government claims no use to have been made of the information obtained, as it does to those Fourth Amendment situations where the evidence was in fact used at trial but is claimed not to have been acquired in violation of the protection against an unreasonable search and seizure. See, *Ethington* v. *United States,* 6th Cir., 379 F.2d 965, 966; *United States* v. *Beard,* 6th Cir., 381 F. 2d 325, 327; *Thompson* v. *United States,* 9th Cir., 382 F. 2d 390, 393; *United States* v. *LaVallee,* 2d Cir., 391 F. 2d 123, 125.

It would appear that the Courts below have here carved out an exception to the *Chapman* rule when the federal constitutional violation to be considered is a post-indictment illegal electronic eavesdrop. There is no valid legal or practical reason for such a distinction. If the *Chapman* rule is to have different applications depending upon the facts and nature of the constitutional breach, then it should be this Court to establish that dichotomy. Since this appears to be the first case after *Chapman* deviating from the standard therein set forth, the petition for the writ should be granted so that this Court may clearly enunciate the breadth of the *Chapman* principle.

V.

The Denial To The Defense Of Additional Admitted Illegal Overhearings Of Defendants' Conversations.

At the hearing on remand, the Government concealed from the defense the contents of nine additional illegal overhearings of the petitioners. The denial to the defense

of access to such overhearings was condoned both by the District Court (App. E, *infra*, pp. 79-80), and by the Court of Appeals (App. F, *infra*, p. 94). Both Courts examined such overhearings *in camera*, and found them not to be relevant to the transactions and evidence on which petitioners were convicted.

Significantly, these now admitted overhearings were not disclosed by the Government when it informed this Court of its overhearing of the Burris-Sigelbaum conversation. Not until the hearing on remand, did it reveal that it had in its possession nine additional illegal overhearings of "some of the defendants".

The propriety of the District Court's *in camera* inspection of these overhearings and its refusal to disclose them to petitioners is now before this Court in *Alderman* v. *United States*, No. 133, O.T. 1967 (originally docketed as *Kolod* v. *United States*), presently pending on the Government's motion to modify this Court's decision. In its original *per curiam order*, 390 U.S. 136, this Court held that the Government could not determine *ex parte* whether illegally overheard conversations of a defendant were arguably relevant to a conviction, and that such determination could be made only "in an adversary proceeding in the District Court". The Government has now asked this Court to modify its order, by permitting the Government to submit the logs of the illegally monitored conversations to the District Court *in camera*, and then having the Court deliver to the defense only those logs which the Court found to have some relation to the prosecution. Such request by the Government is based on no legal foundation, and would in fact violate the defendants' basic constitutional rights under the Fourth, Fifth, and Sixth Amendments. We believe that at a minimum petitioners are entitled to have produced for their own inspection all records

in the possession of the Government of its admittedly illegal interceptions of petitioners' own conversations. Accordingly, certiorari should be granted here so that this case may be reviewed in the light of this Court's decision in *Alderman.*

VI.

Government's Unlawful Intrusion Into Conversations of Defense Counsel And Investigators.

This Court's mandate that a hearing be held relating to the contents of not merely the eavesdropped conversation admitted by the Government, but "any other electronically eavesdropped conversations", *Hoffa* v. *United States,* 387 U.S. 231, 233 (1967), was flagrantly violated by the deliberate deception of the Government. The Government deliberately withheld from the processes of that hearing the disclosure of overhearings of attorneys for the petitioners. The exercise of this Court's supervisory powers to ensure proper compliance with its orders alone would dictate the grant of this petition.

In addition, there is raised the significant novel question of whether such interceptions of trial counsel and their investigators violate the defendants' constitutional rights to due process and effective assistance of counsel. Thus far the disclosures of illegality made by the Government in this case have been made reluctantly and in an attempt to conceal from the Courts and the defense the full extent of its unlawful activities. As a result of the scope of its self-imposed catharsis announced in its Supplemental Memorandum in *Schipani* v. *United States,* No. 504, O.T. 1966, the Government has felt impelled to reveal only those overheard conversations *of a defendant* which it deemed "arguably relevant" to the prosecution. See, Brief for the United States in Opposition, pp. 10-11, *Hoffa* v. *United*

States, No. 546, O.T. 1968. This Court, however, in *Kolod* v. *United States,* 390 U.S. 136 (1968), presently pending on petition for rehearing, held that the Government cannot decide *ex parte* whether or not the overhearing may have affected a defendant's case.

Perhaps nowhere is the Government's attempt to conceal the true extent of its eavesdropping activities more strikingly illustrated than in this very case. During the trial below, numerous defense requests for the production of illegally overheard conversations were denied (H.D.A. 490-492). At no time during the trial did the Government admit that it had conducted any eavesdropping whatever, or that it then had in its possession any records of such overheard conversations. Not until the cause was pending in this Court on petition for a writ of certiorari, did the Government reveal that it had overheard one conversation of *one* of the defendants. *Hoffa* v. *United States,* 387 U.S. 231 (1967). After remand of the case by this Court to the District Court, the Government confessed that the overheard conversation disclosed to this Court was not the only intercepted defendant's conversation in its possession, but that indeed it had *nine* other overhearing of "some of the defendants". 273 F. Supp. 141, 143 (1967). These conversations were not furnished to the defense (H.D.A. 855-864, 865), but were examined by the Court *in camera,* and found by it not to be relevant to the transactions and evidence on which petitioners were convicted (H.D.A. 864).

Even the disclosure of these additional nine overhearings was not the final chapter of the Government's policy of deception seeking to conceal the extent of its eavesdropping activities. At the hearing on remand the Government made no representation as to whether it had eavesdropped on defense counsel, agents, or employees and took the position that it was required to disclose only those conversations in which a defendant participated. Despite the explicit

direction of this Court's mandate, the District Court thereupon limited the inquiry to eavesdropped conversations of defendants only (H.D.A. 857-8), and prevented the introduction of any evidence relating to electronic surveillance on defense counsel or defense investigators (H.D.A. 1071, 1437, 635, 642-3, 857-8, 1513). See this Court's expression of disdain for such unduly restrictive interpretations of such orders, *Remmer* v. *United States*, 350 U.S. 377, 382. Yet nine months later, during the oral argument of this cause in the Court of Appeals, in response to an inquiry from the Court, Government counsel disclosed for the first time that the Government had in its possession records of an undisclosed number of overhearings of defense counsel. To this day, these overhearings have not been disclosed to petitioners, nor has the identity of overheard counsel, nor the time, place or participants in such intercepted conversations.[22]

Surely, the foregoing conduct of the Government represents a studied and considered practice of deception to conceal from the Courts and the defense the extent of its illegality. As so aptly stated by the dissenting opinion of the Court of Appeals, the manner of these disclosures was a "narrow and cavalier response to the Supreme Court's broad direction" (App. F., *infra*, p. 117). Nothing in this Court's mandate in this case, or in the decisions in *Black* v. *United States*, 385 U.S. 26, *Schipani* v. *United States*, 385 U.S. 372, or *O'Brien* v. *United States*, 386 U.S. 345, warrants as much as an inference that freedom from illegal governmental eavesdropping is limited to conversations of the accused alone. Certainly, defendants' right to the effective assistance of counsel under the Sixth Amendment and to due process of law under the Fifth Amendment is

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[22] On October 24, 1968, the Solicitor General admitted, in a Supplemental Memorandum for the United States in *Gorman* v. *United States*, No. 173, O.T. 1968, an unlawful electronic surveillance of the attorney for petitioner Burris.

violated if his attorney's conversations may be intruded upon by the Government with immunity. The integrity of the conversations of his defense investigators, if they be material to the case, should similarly be subject to the same constitutional protection. Here, a conversation between defense investigator O'Brien and counsel for petitioner Hoffa was illegally overheard by the Government during the pendency of the indictment below. *O'Brien* v. *United States*, 386 U.S. 345 (1967). Yet, at the hearing on remand the Government adamantly refused to produce the logs of such conversation, and the District Court denied the numerous defense requests therefor (H.D.A: 630-9, 961-4, 1290, 1368, 1447-8). We submit that the doctrine which impelled this Court's reversal of convictions in *Black*, *Schipani*, and *O'Brien*, *supra*, is rationally applicable to pertinent conversations of defense counsel and investigators.

This cause thus presents an appropriate avenue for the establishment of standards for ascertaining the extent of the Government's illegal activity. The impelling need for the establishment of such standards and this Court's exercise of its supervisory powers in this all-important area warrants the grant of certiorari here.

VII.

Rule 27, Fed.R.Crim.P., Violates the Confrontation Clause of the Sixth Amendment.

Upon remand by this Court to the District Court for evidentiary hearing, the District Court indicated that the burden on the prosecution was to establish that it was aware of the contents of the intercepted conversation prior to the overhearing and that there were "no other electronic trespasses which aided in the conviction in this case." (H.D.A. 797). In an attempt to sustain that bur-

den, the prosecution offered into evidence the affidavits of Charles Bolz and Leon Green (H.D.A. 118, 119). The affidavit of Bolz asserted that he was the Section Chief of the Accounting and Fraud Section of the F.B.I. and that the F.B.I. had caused a diligent search of its records to determine the existence of the overhearing of any conversation participated in by any of the defendants and that such search discovered only the conversation admitted to this Court and the nine other additionally admitted overhearings which were submitted in a sealed envelope. Green's affidavit stated that he was the Deputy Assistant Commissioner of the Internal Revenue Service, that such Service had also caused a search of its records for the purpose of learning of the existence of such eavesdropped conversations, and that no such conversations were discovered. Neither Bolz nor Green was produced as a witness at the hearing. The District Court received such affidavits in evidence (H.D.A. 864), over the objection of the defense (H.D.A. 848-49, 853, 858-64).

The defendants urged that the use of affidavits denied them due process (H.D.A. 860, 864); that the affiants were not subject to cross-examination (H.D.A. 860, 864); that the affidavits were inadequate on their face for the affiants did not describe their duties; that they were based on hearsay; that they made no reference to searches for intercepted conversations of any one but defendants; and, that they did not state the extent or kind of documents examined by affiants (H.D.A. 855-56).

The Court of Appeals held that no prejudicial error was committed in receiving into evidence these affidavits and relied upon Rule 27; Federal Rules, Criminal Procedure. (App. F, *infra*, p. 96). Rule 27 states: "An official record or entry therein or the lack of such record or entry may be proved in the same manner as in civil actions." It thereby incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, 28 U.S.C., thus per-

mitting proof of lack of record through the use of an authenticated written statement (Rule 44(d) Fed. R. Civ. P.).[23]

It would appear that the application of the interaction between Rule 27, Fed. R. Crim. P. and Rule 44, Fed. R. Civ. P., effectively act to eliminate a defendant's personal confrontation by and cross-examination of the witness in which he has an opportunity of testing the statements and deeds to which the witness has testified and by which the government has offered evidence in support of their case. "The primary object of the [confrontation clause of the Sixth Amendment] * * * was to prevent depositions or *ex parte* affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness * * *" *Mattox* v. *United States,* 156 U.S. 237, 242-243; *Barber* v. *Page,* 390 U.S. 719. It is clear that the Sixth Amendment right of confrontation includes the right of cross-examination, *Pointer* v. *Texas,* 380 U.S. 400, and that the denial of the right of cross-examination is a denial of due process of law. *In re Oliver,* 333 U.S. 257. As was recently stated by this Court "There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal". *Pointer* v. *Texas,* 380 U.S. 400, 405. See also, *Douglas* v. *Alabama,* 380 U.S. 415; *Alford* v. *United States,* 282 U.S. 687.

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[23] Rule 44 permitting proof of the lack of an official record requires attestation thereto "by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody." Neither requirement was satisfied by either affidavit here in question. Objection to this infirmity was raised by the defense (H.D.A. 859).

In commenting on these rights, this Court stated in *Green* v. *McElroy*, 360 U.S. 474, 496-97: "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion." See also *Barber* v. *Page*, 390 U.S. 719.

Through the device of the interaction of Rule 44, Fed. R. Civ. P. and Rule 27, Fed. R. Crim. P., the defendants were effectively deprived of the right to confrontation and cross-examination of significant witnesses on a substantial issue pertaining to the question presented by this Court's remand as to whether the illegal interception tainted the convictions of the defendants. To permit this proof to stand on the basis of affidavits would equally permit similar presentation of proof in any stage of the criminal trial, thereby violating the Sixth Amendment rights of persons accused of crime.

There is an apparent conflict between Rule 27, Federal Rules of Criminal Procedure, and the right granted by the Sixth Amendment. This Court should undertake to resolve the apparent differences between the Rule and the Constitution so that whatever import that Rule may have can be clearly delineated within the framework of the Constitution of the United States. For the foregoing reasons, the petition for writ of certiorari should be granted.

Petitioners submit that the foregoing reasons pertaining to the issues arising from the Government's unlawful eavesdropping and the hearing on remand amply illustrate the conduct and tactics of the Government in flouting the basic and constitutional rights of petitioners to due process of law and a fair trial. As stated so aptly by Judge Swygert in the Court of Appeals, ". . . the Government's

narrow and cavalier response to the Supreme Court's broad direction ought not to be condoned." (App. F. *infra*, p. 117). The Government's consistent pattern of deception in an effort to conceal the extent of its eavesdropping activities from the Courts and from petitioners is totally inconsistent with a policy of law enforcement geared to insuring that Constitutional protections are respected.

Indeed, so contemptuous and oblivious has the Government been of the rights of an accused in this regard, that in another case involving petitioner Hoffa, the Government, despite numerous and repeated defense requests, waited until said petitioner had been incarcerated for over nineteen months before revealing to this Court for the first time that it had in its possession illegally obtained records of conversations of the defendants therein (*Hoffa* v. *United States*, *No.* 546, O.T. 1968). Surely, this Court should not condone such nefarious conduct, but should in the exercise of its supervisory powers, and as a deterrent to the continuation of such contemptible strategems, grant certiorari and set aside the judgments of conviction.

We now proceed to discuss those reasons urged for granting the writ, which pertain to the issues arising at trial.

VIII.

Communications From Trial Judge To Deliberating Jury In Absence Of Defendants And Their Counsel.

The Court of Appeals held that although "it was not good practice for the trial judge to have sent the brief message and indictment to the jury in the absence of defendants and their counsel, . . . [u]nder the circumstances then present . . . the procedure now complained of was not prejudicial and does not warrant a reversal of defendants' convictions." (App. A, *infra*, p. 28). Thus, the Court be-

low seemingly acknowledges that petitioners' Fifth Amendment and Sixth Amendment rights to counsel and petitioners' right to be present at trial (Rule 43, Fed. R. Crim. P.) were violated, but that no prejudice was shown. However, the dissent thought the trial judge's action was "plain error", doubted the need to show prejudice for reversal "since the error committed was of constitutional proportions", and found that the record did not negative, but affirmatively showed a reasonable possibility of prejudice to petitioners' necessitating reversal (App. A, *infra*, pp. 44-46).

This Court in *Grosso* v. *United States*, 390 U.S. 62, issued a writ of certiorari to the Third Circuit Court of Appeals (385 F. 2d 154) to review an almost identical question.[24] This Court reversed the convictions on other grounds thus making it unnecessary to decide this particular issue. 88 S.Ct. 709, 715. We urge that certiorari be granted so that this Court may again have the opportunity of deciding whether and under what circumstances such conduct by a trial judge after submission of a case to the jury prevented a fair trial.

A. The decision of the Court of Appeals is in conflict with *Shields* v. *United States*, 273 U.S. 583. There the Court, with no requirement as to prejudice, reversed a federal criminal conviction because the trial judge violated the right of defendant and counsel to be present when the trial judge answered inquiries from a jury. The decision below is in further conflict with the decisions of the Third Circuit Court of Appeals in *Arrington* v. *Robertson*, 114

[24] The question presented in Grosso was: "Can criminal convictions stand where there were communications between the Court and the jury during the jury deliberations in the absence of petitioners and their counsel, and there has been no showing that these communications were not prejudicial to the petitioners."

F. 2d 821, and *United States* v. *Neal,* 320 F. 2d 533; the Sixth Circuit Court of Appeals in *Evans* v. *United States,* 284 F.2d 393; and the Tenth Circuit Court of Appeals in *Fina* v. *United States,* 46 F.2d 643. These decisions reversed trial courts for their answering of inquiries from the jury in the absence of the defendant and his counsel, or in the absence of defendant alone with no requirement as to showing of prejudice. This is in line with our reading of *Shields* and the usual rule that no prejudice need be shown for reversal because of the violation of a constitutional right. *Gideon* v. *Wainwright,* 372 U.S. 335; *Chapman* v. *California,* 386 U.S. 18, 23. See also, *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, 527; *Outlaw* v. *United States,* 5 Cir., 81 F. 2d 805, 808, 809; *Walker* v. *United States,* D.C. Cir., 322 F. 2d 434, 438 (dissenting opinion of Edgerton, J.), and the dissenting opinion of Judge Swygert in this case (App. A, *infra,* p. 45); and compare *United States* v. *Behrens,* 375 U.S. 162 (without requirement as to prejudice, conviction reversed because defendant and his counsel were not present at final sentencing); *Snyder* v. *Massachusetts,* 291 U.S. 97, 136 (dissenting opinion: no need of prejudice for due process reversal of conviction because defendant was not permitted to be present at the jury's viewing of the scene of the crime, although his counsel was present); and *Levine* v. *United States,* 362 U.S. 610, 620 (dissenting opinion: no need of prejudice for reversal when a Sixth Amendment right to public trial is violated).

Subsequent to the time of the Court of Appeals' decision, this Court in analogous situations, has set aside convictions where counsel was not present at some critical stage of a proceeding. See, *Mempa* v. *Rhay,* 389 U.S. 128 (revocation of probation or deferred sentencing proceeding); *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263 (pre-trial line-up); *Miranda* v. *Arizona,* 384 U.S. 436 (in-custody interrogation). Surely,

the absence of both defendant and his counsel at the critical moment of jury-judge communications during jury deliberations is a greater constitutional infringement than the constitutional impairment in the right to counsel cases, and requires reversal, even without a showing of prejudice.

B. The decision of the Court of Appeals is in conflict with the decisions of the Eighth Circuit Court of Appeals in *Rice* v. *United States,* 356 F. 2d 709, and *Osborne* v. *United States,* 351 F. 2d 111; and Ninth Circuit Court of Appeals in *Ah Fook Chang* v. *United States,* 91 F. 2d 805; and the Tenth Circuit Court of Appeals in *Little* v. *United States,* 73 F. 2d 861. These cases reversed convictions because of trial judge-jury communications in the absence of the defendant and his counsel. All of these cases explicitly applied the rule that reversal is required unless the record affirmatively shows no prejudice.[26] In this case, the Court of Appeals placed upon petitioners the burden of affirmatively showing prejudice; for, very plainly, the record here does not affirmatively negate prejudice.

Moreover, *Chapman* v. *California,* 386 U.S. 18, 23 decided after the Court of Appeals' decision in this case teaches "that before a federal constitutional error can be

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[25] Explicit application of the same rule to trial judge-jury communication in the absence of defendant and his counsel resulted in affirmance of conviction in *Jones* v. *United States,* 10 Cir., 299 F. 2d 661, cert. den. 371 U.S. 864; *Ray* v. *United States,* 8 Cir., 114 F. 2d 508, cert. den. 311 U.S. 709; *United States* v. *Compagna,* 2 Cir., 146 F. 2d 524, cert. den. 324 U.S. 867; *Dodge* v. *United States,* 2 Cir. 258 Fed. 300, cert. den. 250 U.S. 600; *Estes* v. *United States,* 5 Cir., 335 F. 2d 609, cert. den., 379 U.S. 964; *Walker* v. *United States, D.C. Cir.,* 322 F. 2d 434; *United States* v. *Agueci,* 2 Cir., 310 F. 2d 817; *United States ex rel. Shapiro* v. *Jackson,* 2 Cir., 263 F. 2d 282; *Outlaw* v. *United States,* 5 Cir., 81 F. 2d 805; *Peppers* v. *United States,* 6 Cir., 37 F. 2d 346; *Chambers* v. *United States,* 8 Cir., 237 Fed. 513.

held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. Here, the Court of Appeals clearly did not apply the *Chapman* test and therefore the decision below is in direct conflict with a recent decision of this Court.

Had petitioners been afforded the opportunity, they might have persuaded the trial judge to adhere to his prior position (Tr. 15239; D.A. 2172, 2176) of not letting the jury have the indictment. Failing that, the petitioners might well have persuaded the trial judge to expurgate the copy of the indictment sent to he jury by elimination of: (1) an allegation of adverse breach of trust (see p. 32, *infra*), theretofore kept from the jury because of considerations of fairness readily agreed to by the trial judge and the Government (Tr. 15294; D.A. 44, 2112-2148); (2) the adverse content of the seven counts not submitted to the jury; and (3) all markings.

Had petitioners been afforded the opportunity, they almost certainly would have been able to persuade the trial judge, with or without the Government's acquiescence, to call the jury into open court, ascertain the nature of their confusion, and instruct them accordingly—after due consideration of suggestions, amendments, and additions offered by petitioners. Instead, with no opportunity for objection, the trial judge cut off all inquiry by the jury with his message that the jury was going to get nothing except the indictment. Yet, the message from the jury with its references to working papers and documents of law, counts, and overt acts indicated that the jury wanted some instruction on something, although just what remains a mystery. The majority opinion regarded the request as "ambiguous as to what specific information the jury desired" (App. A, 24). Hence, for aught that appears

in the record, the jury's verdicts of guilty were influenced by the jury's uncorrected and adverse misconception of some major issue of law or fact or both.[26]

C. In sum, the affirmance of petitioners' convictions on a record which does not negate prejudice contravenes: (1) the rule of *Shields* v. *United States,* 273 U.S. 583, and the other authorities cited in sub-point A, *supra,* which conclusively presume prejudice in a Sixth Amendment violation by trial judge-jury communication in the absence of defendant and his counsel; (2) the rule of this Court and some circuits which, in such circumstances, requires reversal unless the record clearly negates prejudice; and (3) the rule of reversal, unless the record clearly negates prejudice, frequently applied by this Court, not to violations of the Constitution, but to lesser trial errors of non-constitutional proportions.[27]

It is apparent from the decision cited in sub-points A and B, *supra,* that many Federal trial judges continue to disregard the Sixth Amendment right[28] of a defendant to be present with counsel at all stages of his trial, including responses to jury inquiries. And it is further apparent

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[26] See *Bollenbach* v. *United States,* 326 U.S. 607, 612-613; *United States* v. *Jackson,* 3 Cir., 257 F. 2d 41, 43; *United States* v. *Noble,* 3 Cir., 155 F. 2d 315. 318; *Gomila* v. *United States,* 5 Cir., 146 F. 2d 372, 373.

[27] The application of such rule to trial errors of non-constitutional proportions is exemplified by *Bihn* v. *United States,* 328 U.S. 633; *McCandless* v. *United States,* 298 U.S. 342; *Williams* v. *Great Southern Lumber Company,* 277 U.S. 19, *United States* v. *River Rouge Imp. Co.,* 269 U.S. 411; and *Yazoo & Mississippi Valley R. Co.* v. *Mullins,* 249 U.S. 531.

[28] See *Diaz* v. *United States,* 223 U.S. 442, 444; *Ponzi* v. *Fessenden,* 258 U.S. 254, 260; *Jones* v. *United States,* 10 Cir., 299 F. 2d 661, 662, cert. den. 371 U.S. 864; *Fina* v. *United States,* 10 Cir., 46 F. 2d 643, 644; cf. *Arrington* v. *Robertson,* 3 Cir., 114 F. 2d 821; *United States* v. *Douglas,* 7 Cir., 155 F. 2d 894.

that the various Courts of Appeals differ as to the rule of prejudice applicable to such widespread and ever-recurring trial errors in violation of constitutional rights. Authoritative clarification as to the rule concerning prejudice is needed. Finally, this Court's review in exercise of its supervisory powers is needed to secure better trial judge compliance with the Sixth Amendment.

IX.

Jury Instruction That One Using A Position Of Trust To Obtain Benefits Is Performing An Active Fraud.

There appears to be no dispute[29] that in order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud, that is, nothing more than the receipt and retention of unwarranted benefits. But because a breach of trust may be an active fraud punishable under the criminal statute, or may likewise be a constructive fraud, that does not make the terms interchangeable. *Epstein* v. *United States,* 6 Cir., 174 F. 2d 754, 766.

Nevertheless, the Court of Appeals approved an instruction to the jury which equated "breach of trust" with "active fraud", though in so doing, it converted all constructive frauds into active punishable frauds:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active[30] fraud." (D.A. 2141).

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[29] Br. in Opp. p. 56.

[30] The transcript indicates "act of" (Tr. 16, 505), although the difference is probably unimportant.

Consequently, even if the jury merely found that a "fiduciary" benefits by a good faith breach of his trust, they were obliged *ipso facto* to find an offense to have been thereby committed. In this fraud case, conviction required proof that petitioners devised a scheme and conspiracy to defraud the Pension Fund. The instruction, however, allowed guilt on the singular breach of a civil fiduciary duty only.

Intent to defraud is generally not only an essential element of fraud, but as here, the crucial issue. *United States* v. *Shavin*, 7 Cir., 287 F. 2d 647, 652; *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653; *Miller* v. *United States*, 10 Cir., 120 F. 2d 968, 970. When an instruction dilutes intent to less than a knowing purpose and design to defraud, the result is reversible error. *West* v. *United States*, 10 Cir., 68 F. 2d 96, 98; *Frank* v. *United States*, 10 Cir., 220 F. 2d 559, 564. When coupled with the Court's failure to define "fiduciary"[31] and the fact that the jury had been given the indictment containing an undeleted, but previously excluded reference by a quasi-judicial entity to petitioner Hoffa's "breach of his fiduciary duties", the entire charge to the jury on the issue became, at best, equivocal. As this Court stated in *Bollenbach* v. *United States*, 326 U.S. 607, 612, "A conviction ought not to rest on an equivocal direction to the jury on a basic issue," and again at p. 690, "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge." Conviction founded on this erroneous instruction should not stand and the petition for the writ should be granted.

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[31] Evidence showed that various petitioners had economic relations with each other, or with others, which the jury could have understood to be fiduciary relations. C.f., *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 85.

X.

Failure of Cautionary Instruction To Remove Prejudice Ensuing From Incriminatory Admissions of Co-defendants.

The trial of petitioners gives rise to a substantial novel question interpreting this Court's holding in *Bruton* v. *United States,* 391 U.S. 123, that a criminal conviction cannot stand where the admission of a co-defendant implicated the defendant, at a joint trial, even though accompanied by a cautionary instruction. Here, co-defendant Benjamin Dranow testified on his own behalf. The Government sought to impeach that testimony through the use of certain letters written by Dranow which indicated that he was demanding a payoff from his several co-defendants for accepting criminal blame. These letters were made available by Irving Link, who had testified in the Government's case-in-chief. Link was later recalled as a rebuttal witness for the purpose of establishing the background of the letters.

Over objection by petitioners, the district judge instructed the jury to consider the Link letters only as to Dranow. Subsequently, the judge refused to admit the letters into evidence. He referred to their prejudicial nature and later gave a cautionary instruction to the jury to disregard both the testimony of Dranow and Link "in regard to those letters, and do not take that into consideration in any way in arriving at your verdict".

The majority below held that together with the cautionary instructions given the jury "There was no error as the letters were admissible to impeach Dranow." The dissent, in a remarkable anticipation of the *Bruton* holding said, "The crucial question is whether the disclosure of the contents of the letters was so prejudicial to the other defendants that the prejudice could not be cured by the

final exclusion of the letters from evidence. . . . The dissent held that "The letters were inherently prejudicial to all defendants." (App. A, *infra*, pp. 40-41).

Following the eavesdrop hearing, petitioners urged the *Bruton* principle in the Seventh Circuit with respect to the Link letters and certain extra-judicial testimony of petitioner Burris admitted at trial. The Court held that the Burris statements not to be incriminating with respect to the indictment in this case or as to any co-defendant, but failed to apply the harmless error rule of *Chapman* v. *California*, 386 U.S. 18, applicable in all constitutional errors (App. F, *infra*, p. 102). See, *United States ex rel. Johnson* v. *Yeager*, 3 Cir., 399 F. 2d 508. As to the Link letters, the Seventh Circuit found that *Bruton* did not alter its prior decision on the point and that opportunity to cross-examine Dranow was afforded petitioners (App. F, *infra*, p. 103).

Clearly, the Link letters were so inflammatory and prejudicial to petitioners' rights to a fair trial that the District Court, and by implication the Court of Appeals, concluded that such letters and the accompanying testimony thereto should have been excluded from the jury's consideration. The Court of Appeals effectively held, in spite of *Bruton*, that a cautionary instruction sufficed to protect petitioners.[32]

While this Court has stated that not every admission of inadmissible evidence can be considered to be reversible error unavoidable through limiting instructions, it seems clear that that caveat applies more appropriately to those "instances [which] occur in almost every trial where in-

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[32] In its opposition to the prior petition for certiorari, *Hoffa* v. *United States*, No. 1003, O.T. 1966, the Government specifically relied on the now overruled holding in *Delli Paoli* v. *United States*, 352 U.S. 232, to support the lack of prejudice to petitioners.

admissible evidence creeps in, usually inadvertently". *Bruton* v. *United States,* 391 U.S. 123. Here, Judge Swygert held "there can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory material into the case prejudicial to all the defendants". (App. A, *infra,* p. 41).

This case raises a novel issue interpreting *Bruton's* recent revitalization of the philosophy of *Jackson* v. *Denno,* 378 U.S. 368, repudiating the adequacy of limiting instructions as a sufficient device for preserving a fair trial. See also, *Burgett* v. *Texas,* 389 U.S. 109; *United States* v. *Smith,* 6 Cir., 4 Cr. L. 2091. Here, the evidence was excluded as to all defendants because of its inflammatory nature. Here, the Government's motives for the introduction of the poisonous matter are seriously questioned. Here, the district court refused to allow the matter to stand even against Dranow after "weighing the damages against the benefits." (D.A. 2064).

However, the Seventh Circuit's decision here, holding *Bruton* inapplicable because Dranow testified and was available for cross-examination[33] is contrary to its own opinion in *United States* v. *Guajardo-Melendez,* 401 F. 2d 35, decided less than a week before this case.[34] *Cf., Barber* v. *Page,* 390 U.S. 719, where a witness was not cross-examined though opportunity was afforded at preliminary

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[33] The petitioners have consistently contended that Dranow's obvious incompetence required a severance from him. The effective ability to cross-examine him was totally obviated by his irrationality and the serious question of his ability to intelligently answer questions which was inherent in his obvious lack of rational competence.

[34] The Ninth Circuit had declined to follow *Guajardo-Melendez* in *Santoro* v. *United States,* 9 Cir., 4 Cr.L.Rep. 2170.

hearing. See also, *United States* v. *Bujese,* 392 U.S. 297, where a co-defendant testified and was cross-examined but this Court reversed in light of *Bruton.*

While this Court has by its *Bruton* decision, strongly undercut the proponents of cautionary instructions as the panacea for obvious trial errors, this case requires an interpretation of the circumstances in which a cautionary instruction will suffice in a joint trial and therefore the writ should be granted.

XI.

Prejudicial Newspaper Articles Imparted To Sequestered Jury By Its Foreman And Prejudicial Statements By Some Jurors.

After the return of the verdict, alternate juror Pare' sought out counsel for petitioner Hoffa and submitted an affidavit attesting that a news article relating to the exclusion of the Link letters had been circulated by Foreman Gogerty (D.A. 310, 311, 2187) and that many prejudicial statements had been exchanged between the jurors. Though Pare' testified in detail to the foregoing (D.A. 305-314, 2181-2218), the trial court denied petitioners' motion for a new trial (D.A. 2212) and petitioner Hoffa's motion to reassemble the jury for the purpose of allowing inquiry concerning their awareness of the articles and their exchanges of expressions of hostility towards Hoffa during the trial and before deliberation (D.A. 2215).

The protection of petitioners' constitutional rights of fair trial, of confrontation, of cross-examination, of counsel and of trial by an impartial jury minimumly required the trial judge to ascertain which jurors had read the newspaper article, and what information they had obtained from it. The Government previously urged here that the newspaper article "did not acquaint the jury with anything which they did not know as a result of the trial." (Br. in

Opp., p. 45). This statement is simply untrue. Juror Gogerty, and any other juror seeing this article, learned therefrom: (1) That the judge had rejected two motions for judgment of acquittal; (2) That in so doing, the judge had rejected a contention of petitioner Hoffa's innocence and "good faith"; and (3) that the Link letters had in fact stated that Dranow "would take the blame" and had "asked for a $60.00 a day payoff from co-defendants".[35]

The article was headlined, "Hoffa Turned Down on 2d Acquittal Plea" (D.A. 311). "Acquittal" in general usage means, or strongly suggests, a finding of innocence. To laymen jurors in any criminal trial, a motion for a judgment of acquittal might well mean a request for a finding by the trial judge of innocence, and its rejection simply a finding of guilt by him. Doubtless, this is why such motions are heard and decided out of the jury's presence.

In addition, the article described the defense argument in support of the second motion for judgment of acquittal as one made "in contending [Hoffa's] innocence" and that such motion was based on a contention "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith' ". The Trial judge's rejection of an argument so characterized almost inevitably implies that the judge, himself, found petitioner Hoffa guilty, and that Hoffa's testimony was lacking in "good faith" on "the stand". Unquestionably, the Sixth Amendment would invalidate all verdicts of guilty influenced by such a jury understanding of the trial judge's two rulings against petitioner Hoffa, the central figure in the offenses charged, and a defense witness. See *Parker* v. *Gladden*, 385 U.S. 363,

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[35] The several petitioners mentioned by name in but one of the two Link-Dranow letters were not described in the letters as "codefendants." Three petitioners, including Hoffa, were not mentioned at all.

where only the bailiff, not the trial judge, said petitioner was guilty; and see *Henry* v. *United States,* 6 Cir., 204 F. 2d 817; *Briggs* v. *United States,* 6 Cir., 221 F. 2d 636. Yet here, there is the strong prejudice to all petitioners from any reading by the jury of the newspaper article's untested and uncross-examined assertion that petitioner Dranow "would take the blame" and asked "a $60.00 a day payoff from co-defendants".

The affirmance by the Court below of the trial judge's denial of inquiry in these circumstances runs counter to the whole course of settled decisions on the subject. We cite the cases in the margin.[36] In many of them, the potential prejudice to the defendant was fairly comparable to, or less than, the obvious prejudice to petitioners here. Constitutional rights without remedies are not of much use. Here, both courts below ignored and denied the well-established remedy for enforcement of petitioners' rights of fair trial. We ask the exercise of this Court's supervisory power in protection of those rights.

Furthermore, the decision below is in direct conflict with the recent decision by the Tenth Circuit Court of Appeals in *Mares* v. *United States,* 383 F. 2d 805. There, a newspaper article regarding the defendants' withdrawn guilty plea and oral confession and the out of context statements of the trial judge in excluding the same from evidence appeared during the trial. The hearing on the offer to

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[36] *Janko* v. *United States,* 366 U.S. 716; *Remmer* v. *United States,* 347 U.S. 227, 229-30; *Mattox* v. *United States,* 146 U.S. 140, 150-151; *United States* v. *Accardo,* 7 Cir., 298 F. 2d 133, 136; *Coppedge* v. *United States,* D.C. Cir., 272 F. 2d 504, 508; *Briggs* v. *United States,* 6 Cir., 221 F. 2d 636; *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, 528; see *United States* v. *Gersh,* 2 Cir., 328 F. 2d 460, 464, cert. den. sub nom *Mugnola* v. *United States,* 377 U.S. 992; *Baker* v. *Hudspeth,* 10 Cir., 129 F. 2d 779, 782.

introduce the oral confession into evidence was not conducted in the presence of the jury. Although defense counsel moved for a mistrial, no request was made that the jury be examined as to whether any members had read it. Nevertheless, the Tenth Circuit held that the trial judge should have examined the jury, stating that the Court's failure to determine whether the jurors had been exposed to the prejudicial article required the granting of a new trial. Here, the trial court should have ascertained what jurors had read the prejudicial newspaper article and what effect it had upon their decision.

B. In another aspect, the denial in this case of new trial or inquiry of the jury presents important questions of the correct interpretation, and the breadth or narrowness of the applicability of this Court's decision in *Parker* v. *Gladden*, 385 U.S. 363, to the administration of justice in federal and state criminal proceedings. Here, it is a fact that some of the jurors, including juror Gogerty (later elected foreman) made numerous statements of petitioners' guilt to their fellow jurors. For detail on these statements see *supra*, pp. 38-40.

Such statements were made prior to the jury's deliberations on innocence or guilt. They clearly showed, at least, the premature partiality and bias of the jurors making them. *Parker* invalidated a conviction because of the bailiff's statement to some jurors of the guilt of the defendant,[37] a statement that was of decisive consequence

[37] In *Parker*, the bailiff also made a statement that the Supreme Court would correct anything wrong in finding the defendant guilty. An equivalent statement was made by a juror here. See Statement, *supra*, p. 39.

because of his expression of it to jurors was prejudicial to the defendant. The statements of guilt here by some jurors, besides showing their own adverse bias, were likewise calculated to prejudice other jurors against the defendants, petitioners here. As the Court noted in *Parker*, a bailiff in charge of a jury carries great weight with its members. So does a fellow juror, and, even more so, a fellow juror so pre-eminent amongst his fellows as to be elected foreman. Is *Parker* applicable to the prejudicial statements of jurors, or of a jury foreman, made before the jury's deliberations? And, more particularly, in light of *Parker* and Sixth Amendment rights to a verdict based on evidence at trial considered by impartial jurors, can verdicts of guilty stand, even though the adverse partiality of some jurors is manifest, and their fellow jurors are subject to the repeated impact of their statements of the guilt of the defendants?

XII.

Refusal Of Trial Judge To Grant Other Petitioners A Severance From Dranow And To Order Mental Examination.

The prejudice to these petitioners from having to stand trial with co-defendant Dranow was substantial. These petitioners were irreparably prejudiced by Dranow's self-destructive and self-incriminating testimony and conduct during the trial. Without burdening the Court with a repetition of this misconduct, we refer the Court to Statement of Facts, *supra*, pp. 40-43.

On numerous occasions before and during trial, petitioners moved for a mistrial or severance as a result of co-defendant Dranow's misconduct (D.A. 373, 396, 552; Tr. 923-4; 2252-3; 2258-60).

The dissenting opinion below stated that "During the trial Dranow made frequent outbursts and had many

verbal clashes with the judge, the attorneys, the marshals, and even spectators. As a witness, he was vulgar and boisterous" (App. A, *infra,* pp. 37-38).

We submit that when this prejudice to petitioners became apparent to the Court during the trial, the trial court should have granted a severance from co-defendant Dranow. The Court's refusal to grant the numerous requests for severance by reason of such irrational conduct of a co-defendant, resulting in obvious prejudice to petitioners, was a denial of petitioners' rights to a fair trial. *United States* v. *Kelley,* 2 Cir., 349 F. 2d 720, 758 cert. denied, 384 U.S. 947; *United States* v. *Haupt,* 7 Cir., 136 F. 2d 661, 673; *Ingram* v. *United States,* 4 Cir., 272 F. 2d 567; *Schaffer* v. *United States,* 362 U.S. 511, 516.

At a minimum, however, when the flagrant misconduct and irrationality of co-defendant Dranow became apparent to the Court, these petitioners were entitled to have the trial court conduct a hearing to determine the mental competency of their co-defendant. Under Section 4244, Title 18 U.S.C., such an examination to determine mental competency should be made upon the Court's own motion, where the circumstances warrant, irrespective of whether requests for the same are made by the defendant suspected of being mentally incompetent. It is the Court's ultimate duty to determine whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States,* 362 U.S. 402. The Government, in its brief in opposition to petitioners' earlier petition for writ of certiorari (p. 59) argued that the Court was not required to order a mental examination of Dranow since Dranow's counsel did not submit any reports of Dranow's psychiatrists as to his

condition, and that this constituted an abandonment of the claim of mental incompetency. Assuming such to be the case, *these* petitioners ought not be prejudiced by failure of a co-defendant to submit such reports. The duty of the trial court under the circumstances here presented, remained clearly as provided in Section 4244, to order the mental examination.

This case, therefore, presents a unique opportunity for this Court to determine the rights of co-defendants to a fair trial, when they are compelled to stand trial jointly with a co-defendant whose mental competency is so graphically placed in issue.

XIII.

Accused's Effective Right To Testify On His Own Behalf Precluded By Impeachment Through The Use Of A Non-Final Conviction For A Subsequent, Unrelated, But Highly Prejudicial Offense.

A. The holding here of the Court of Appeals[38] that it is proper to impeach a defendant by a conviction which is still pending on appeal and not final is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Fenwick* v. *United States*, 252 F. 2d 124. In the latter case, the Court reversed Fenwick's conviction precisely because of such impeachment by a non-final conviction, and further held it to be immaterial that before its decision the impeachment conviction had become final.

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[38] The Government in its brief in opposition to petitioners' earlier petition for certiorari contended that petitioners' "failure to object to the question *in the presence of the jury* should foreclose their present claim" (Br. in Opp. 51). We contend that to force defense counsel to renew an objection that had already been denied would serve no valid purpose. See *Miller* v. *California*, ... U.S. ....., 20 L.Ed. 2d 1332, and cases cited at ..... U.S. ....., 20 L.Ed. 1336.

by reason of the same Court's affirmance. Additionally, here the impeaching conviction for jury-tampering is still under review by this Court.[39] (See *Hoffa, et al* v. *United States,* No. 546 O.T., 1968, wherein on October 21, 1968 the Government first revealed that it has in its possession records of an undisclosed number of conversations of defendants which were illegally monitored by the Government. Defendants' motions to set aside the judgments of convictions are presently pending in this Court).

The *Fenwick* decision in the District of Columbia Circuit followed two earlier decisions in the same circuit. See *Campbell* v. *United States,* 176 F. 2d 45 (Impeachment by a conviction on appeal held error); *Beasly* v. *United States,* 218 F. 2d 366, cert. den. 349 U.S. 907 (Impeachment by conviction on which sentence was not yet imposed held error).

The decision of the Court below followed its earlier decision in *United States* v. *Empire Packing Co.,* 174 F. 2d 16, cert. den. 337 U.S. 959 (In a non-jury case, impeachment by a conviction then on appeal held proper). And the result reached by the Court below finds some support in *Bloch* v. *United States,* 9 Cir., 226 F. 2d 185, cert. den. 350

[39] The disagreement between the holding of the Court below and the decisions of the Court of Appeals for the District of Columbia Circuit in *Fenwick,* and other cases cited in the text of this point on impeachment is further emphasized by another consideration. In the District of Columbia Circuit, unlike other federal jurisdictions, it is a statute of Congress which makes prior convictions generally admissible for purposes of impeachment; and therefore, even though the Court of Appeals for that Circuit has some doubt as to its power to find some types of prior convictions inadmissible, *Richards* v. *United States,* D.C. Cir., 192 F. 2d 602, 606, cert. den., 342 U.S. 946; *Brown* v. *United States,* D.C. Cir., 370 F. 2d 242, nevertheless, it has done so.

U.S. 948 (Prosecutor's asking defendant about a conviction then on appeal held not a showing of bad faith on prosecutor's part).[40]

The conflicts between the *Fenwick* and *Campbell* decisions in the District of Columbia Circuit and the Seventh Circuit's decision in this case and in *Empire Packing Co.* have been intimated by the Court below (App. A, *infra*, p. 29), and expressly noted by the trial judge in this proceeding (D.A. 367), the Court of Appeals for the District of Columbia Circuit,[41] the Court of Appeals for the Ninth Circuit,[42] and the Court of Appeals for the Second Circuit.[43]

The confusion in the circuits arising from the conflict between the rule applied in the District of Columbia Circuit and that applied in the Seventh Circuit is increased by the application in the Second Circuit of still a third rule which is different from both of them. In the District of Columbia Circuit, a non-final conviction cannot be used for impeachment, whatever may be the subsequent history of the conviction. In the Seventh Circuit, a non-final conviction can be used for impeachment, whatever may be the subsequent history of the conviction. But in the Second Circuit such use of a non-final conviction is not reversible error if the conviction later becomes final; and the question is open whether it be reversible error if the conviction is later invalidated. See *United States* v. *Cipullo*, 170 F. 2d 311, and *United States* v. *Owens*, 271 F. 2d 425.

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[40] However, *United States* v. *Levi*, 177 F. 2d 827, a decision of the Seventh Circuit, held it reversible error to impeach by a conviction then subject to a motion for judgment of acquittal.

[41] See *Fenwick* v. *United States*, 252 F. 2d 124, 126n.

[42] See *Bloch* v. *United States*, 226 F. 2d 185, 188, cert. den. 350 U.S. 948.

[43] See *United States* v. *Owens*, 271 F. 2d 425, 426.

Each of these three differing rules is well-embodied in its own Circuit by the authority of at least two decisions within each Circuit. The mere passage of time without this Court's intervention is not likely to effect reconciliation and the achievement of one rule consonant with constitutional rights and uniform for all federal circuits on this question which so strongly and so often affects the issue of acquittal or conviction.

In the development of our jurisprudence, judicial proceedings have been evolved for the testing of the validity of a conviction against pertinent provisions of the Bill of Rights. To permit impeachment by a conviction that was and still is under judicial scrutiny in such proceedings comports neither with the Constitution, nor with the law's providing for such proceedings to ensure protection of a citizen's constitutional rights.

B. Entirely apart from the problem of a non-final conviction, the decision of the Court below is in conflict with the decisions of the Court of Appeals for the District of Columbia Circuit in *Luck* v. *United States,* 348 F. 2d 763, and *Brown* v. *United States,* 370 F. 2d 242. The *Luck* and *Brown* cases require a trial judge in the District of Columbia to permit or prohibit impeachment only upon a search for the truth by considering all relevant factors, such as, for example, the need for the defendant's testimony, and the prejudice to defendant as against the relevance of the conviction to his credibility. But here the trial judge and the Court of Appeals, in the light of prior decisions in the Seventh Circuit, approved the impeachment of petitioner Hoffa upon an automatic rule of admissibility, regardless of prejudice and relevance to credibility or any other circumstance. See App. A, *infra*, p. 28; *United States* v. *Pinna,* 7 Cir., 229 F. 2d 216, 219; and *Rinella* v. *United States,* 7 Cir., 60 F. 2d 216, 218.

Permitting impeachment by prior conviction of a man on trial for his life or liberty gives him but a ruinous choice. He can testify in his own defense, and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt of the crime charged from the fact of his prior conviction.[44] Or he can decline to testify and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt of the charged crime from the fact of his silence. Neither choice is conducive to the ascertainment of the truth and the protection of the innocent.

This view was ably expressed by the then Dean of the Harvard Law School, the current Solicitor General, when he urged:

> "The man with a prior criminal record in this country is far more at the mercy of the authorities—police and judicial—than seems to me to be warranted. * * * if he is arrested and put on trial, he has two almost hopeless alternatives in many states. He can take the stand and deny his participation in the crime now charged. If he does this, his prior conviction can often be shown to impeach his testimony, in which case he is very likely to be convicted. Or he can refuse to take the stand, resting on his Con-

[44] Recent studies of juries by the University of Chicago have found that jurors have "an almost inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." 70 Yale L.J., 764-777. Other case studies have demonstrated that innocent defendants are often deterred from testifying in their own behalf because of the fear of impeachment by prior convictions, and that such impeachment has been a key factor in convicting innocent persons. 78 Harv. L. Rev. 426, 442; Borchard, *Convicting the Innocent* (1932) 121, 138, 162; 232, 365-66; Frank, *Not Guilty* (1957) 106-07.

> stitutional privilege, in which case he is also very likely to be convicted. Ought we not, even with persons who have once offended against society, undertake to develop procedures which will seek as far as possible to bring out the truth about the crime now charged, not some prior crime?"
> Griswold, *The Long View,* 51 Amer. Bar. J. 1017,1021.

When the prior conviction has no bearing on the substantive elements of the crime presently charged, the realization by an accused that his right to testify in his own behalf is subject to impeachment by a non-related, non-relevant conviction gives him a choice "between the rock and the whirlpool." See, *Garrity* v. *New Jersey,* 385 U.S. 493; *Spevak* v. *Klein,* 385 U.S. 511.[45] The unfairness inherent in this choice was compounded below where the impeaching conviction was obtained through a deliberate effort to manipulate prosecutions (see *infra,* p. 100) for the precise purpose of confronting petitioner Hoffa, if he were convicted,[46] with his conviction in a heinous crime.

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[45] Compare, *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62 and cases following, where this Court's philosophy similarly decrying the choice of giving up Fifth Amendment rights in order to comply with a statute was underscored.

[46] Conjecture leads us to consider that a sequestered jury considering mail fraud charges would be more influenced by a conviction of a jury tampering charge, than would a jury considering jury tampering charges be influenced by conviction of a mail fraud charge.

If such impeachment is to be permitted at all,[47] the rule adopted by the District Court of Columbia Circuit is preferable to the rule of the court below. The District of Columbia rule, at least, seeks, in the light of all pertinent circumstances, to balance the remoteness or closeness of the prior conviction's relation to credibility against the great or small need for the defendant's testimony, and the great or small prejudice to him if impeachment be permitted.

Yet, neither rule is best adopted for the ascertainment of the truth and the protection of the innocent against verdicts of guilty. This case provides an appropriate occasion for the Court's first consideration of a rule on impeachment for the federal courts which would seem best in assuring the ascertainment of the truth and the protection of the innocent—the two paramount objectives of justice in criminal cases. Such a rule, as repeatedly suggested or recommended by the studies of legal scholars,[48]

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[47] The rule permitting such impeachment is a relic of the original common-law rule that persons who had been convicted of infamous crimes were incompetent to testify even in their own behalf. Both the original rule and its derivative are based on the assumption that the testimony of defendants having such prior convictions is less trustworthy than the testimony of other defendants. Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 174-76; 2 Wigmore, *Evidence* (3d 1940) §519, p. 608; *Clawans* v. *District Columbia*, D.C. Cir., 62 F. 2d 383, 384, aff., 300 U.S. 617. This assumption, it has been pointed out, has no basis in experience or reason, it is not so infallible as to warrant its application to any particular defendant. Ladd, *supra*, at 176-78; 2 Wigmore, *supra*, §519, p. 602, 70 Yale L. J. 764.

[48] See *Other Crimes Evidence At Trial: Of Balancing And Other Matters;* 70 Yale L. J. 764, 765-778 (1961); *Procedural Protections Of Criminal Defendants—A Re-evaluation Of The Privilege Against Self-Incrimination And The Rule Excluding Evidence Of Propensity To Commit Crime*, 78 Harv. L. Rev., 426, 442; McCormick, *Evidence* (1954) §43; Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 189.

would bar impeachment by conviction of a man on trial for his life or liberty and testifying in his own defense—at least where he has not put his own character in issue.

C. Finally, the Government's manipulation of indictments, trials, and charges so as to create the record of a conviction of a single defendant (Hoffa) of a subsequent offense for impeachment in use of the trial here of a prior offense (see Statement, *supra*, pp. 43-45) is the same as the governmental operation condemned as basically unfair, and therefore requiring reversal, in *Commonwealth* v. *McIntyre*, 417 Pa. 415, 208 A. 2d 257 (1965). The affirmance of petitioners' convictions in disregard of the Government's unfair and manipulative tactics which created "an atmosphere of prejudice against all defendants" (App. A, *infra*, p. 35) and helped the getting of those convictions and violated petitioners' rights to a speedy trial, calls for review by the Court in the exercise of its supervisory powers.

XIV.

The Removal Of A Juror Without Ascertaining Whether He Had Become Unable Or Disqualified To Perform His Duties.

Rule 24(c), Federal Rules of Criminal Procedure, provides:

> "Alternate jurors . . . shall replace jurors who, prior to the time the jury retires to consider its verdict, become *unable to or disqualified* to perform their duties." (Emphasis supplied)

The grounds for disqualification of jurors are set forth in 28 U.S.C. §1861: (1) felony conviction, (2) inability to read, write, speak and understand the English language, and (3) incapacity of the juror by reason of mental or physical infirmities to render efficient jury service. Obviously, the first and second grounds of statutory dis-

qualification do not apply here. Whether juror Lee was unable to or disqualified by "mental infirmities" to perform his duties because of the injury to and possible death of his mother could not rationally be determined without inquiry of him.

To permit this procedure to stand as an acceptable method of removing a juror, not only clearly obviates the controlling rule of procedure, but effects a new and dangerous power in the district court, to wit, the authority unilaterally and without measurable standards of restraint to cause the removal of a juror. Rule 24(c) should not be expanded without direct approval by this Court and, therefore, the writ should be granted to determine this issue.

XV.

Multiple Schemes and Conspiracies and Irrelevant Transactions Presented As One Single Scheme and Conspiracy to Defraud.

When this Court last reviewed the permissible scope of conspiracy prosecutions, it again warned that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404.[49] The present case, essentially a "hodgepodge" of disassociated lawful transactions, presents a singular opportunity for the Court to review and delineate the permissible limits of conspiracy prosecutions. If permitted to stand,

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[49] See also *Krulewitch* v. *United States,* 336 U.S. 440; *Kotteakos* v. *United States,* 328 U.S. 750; *Lutwak* v. *United States,* 344 U.S. 604; *Delli Paoli* v. *United States,* 352 U.S. 232; *Bollenbach* v. *United States,* 326 U.S. 607; *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408; *United States* v. *Wortman,* 7 Cir., 326 F. 2d 717.

it will "broaden" the "wide-sweeping nets" of conspiracy prosecutions in the following respects: A) By the device of alleging, purportedly as a single scheme and conspiracy, unrelated transactions in each of the 28 counts of the indictment, the Government has prosecuted multiple schemes and conspiracies and non-criminal conduct as a single scheme and conspiracy, all to the prejudice of petitioners in conflict with this Court's decision in *Kotteakos* v. *United States,* 328 U.S. 750; B) By the same device, the Government was permitted to introduce great amounts of evidence which was not material or relevant to the common object of the claimed scheme and conspiracy, in conflict with the decisions of this Court and the Circuit Courts of Appeals; C) The trial Court's instructions erroneously failed to inform the jury that a finding of a single conspiracy and scheme was necessary for conviction, all in conflict with *Kotteakos* v. *United States, supra,* and *United States* v. *Borelli,* 2 Cir., 336 F. 2d 376. We discuss each of these aspects in turn.

A. The decision below is in conflict with *Kotteakos* v. *United States, supra,* and a line of Courts of Appeals decisions based thereon,[50] which hold that it is a prejudicial misjoinder of defendants when the Government prosecutes multiple conspiracies and schemes, each of which does not involve all of the defendants, as one single scheme and conspiracy. All of the judges below agreed that the central purpose of the alleged conspiracy and scheme was to "bail out" Sun Valley. They also agreed that the alleged unlawful scheme and conspiracy was to defraud the Pension

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[50] *United States* v. *Goss,* 4 Cir., 329 F. 2d 180; *United States* v. *Russano,* 2 Cir., 257 F. 2d 712; *Rocha* v. *United States,* 9 Cir., 288 F. 2d 545; *Daily* v. *United States,* 9 Cir., 282 F. 2d 818; *Canella* v. *United States,* 9 Cir., 157 F. 2d 470.

Fund by submitting false and fraudulent representations and concealing material facts to obtain loans.[51] Thus it is apparent, as the dissent emphasizes, that unless the evidence concerning a particular loan tended to prove both these ultimate facts, such evidence either established a separate scheme and conspiracy or was wholly irrelevant. (App. A, *infra*, p. 52).

The Government does not deny, and indeed, a close reading of its Brief in opposition filed earlier in this Court (Br. in opp. 36-37) confirms, that the Government introduced evidence on many Pension Fund loans without any attempt to fulfill the two requisites of the single scheme and conspiracy charged, to wit, fraud on the Pension Fund and use of loan proceeds for the Sun Valley reorganization. Thus, the Government erroneously contends and the Court of Appeals erroneously finds that the Government could properly prove at trial the "relationships among the parties" and introduce evidence pertaining to loans "which did not demonstrably assist the Sun Valley enterprises." (Br. in opp. 37).

As the dissent points out, there was no evidence that the Miracle Plaza, Miami International Airport Hotel, Birmingham Airport Motel, Club 300, Causeway Inn, the first and third First Berkeley and the fourth Fontainebleau loans had any relationship either to defrauding the Fund or to the common object of the alleged conspiracy and scheme, namely, the rehabilitation of Sun Valley, Inc. In addition, as the dissent notes, no relation was shown to the rehabilitation of Sun Valley in the following loans: 4306 Duncan Corp., third Fontainebleau, Good Samaritan

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[51] These two requirements go to all counts, substantive as well as conspiracy, for all counts alleged the same scheme and conspiracy. (See App. A, *infra*, p. 49).

Hospital, Casa Marina and La Concha, second Key West, second Everglades and the second First Berkeley loans.

Further, as the dissent observes, there was no misrepresentation to, or fraud on, the Fund in the first Everglades, the first Fontainebleau and the first Key West loans.

The 4306 Duncan Corp. loan was completely foreign to any possible concept of a conspiracy among the defendants. There was no claim that any of the defendants profited from the loan. It was solely for the benefit of Trustee Strecker, who was not shown to have any connection with or interest in Sun Valley or any of the other loans proved.

Moreover, as the dissent further notes, there was no evidence that petitioners Strate, Hyman and Kovens had any interest in the success of the claimed common purpose of the conspiracy—the rehabilitation of Sun Valley. Their interests in their loans were for their personal benefit. Cf. *Rocha* v. *United States,* 9 Cir., 288 F. 2d 545; *Canella* v. *United States,* 9 Cir., 157 F. 2d 470. If, taken in the view most favorable to the Government, misrepresentations were made, the loans in which Strate, Hyman and Kovens were respectively interested constituted, if illegal, separate schemes and conspiracies, and were not, in any event, part of the single scheme and conspiracy charged.

The above summary demonstrates that the many loan transactions alleged and proved were not "part of the same series of acts or transactions constituting an offense or offenses" as required by Rule 8(b) for the joinder of defendants.

The claimed cohesive force—common object of the conspiracy and scheme—was the rehabilitation of Sun Valley. Yet, as noted, a majority of the loans had no relation at all to that object, and there was no showing that the many

loans alleged constituted a "series of acts or transactions" necessary for the joinder of all of the defendants in each count of the indictment.

B. As we have pointed out and as admitted by the Government (Br. in Opp. 37), there was no evidence that many of the loans which were proved had any relation either to defrauding the Pension Fund or to the common object of the alleged conspiracy, the rehabilitation of Sun Valley. The evidence with respect to them, as the dissent holds, was wholly irrelevant and immaterial to the unlawful conspiracy charged, and the approval of its admission was therefor in conflict with the Seventh Circuit's own decision in *United States* v. *Wortman,* 326 F.2d 717; and with *United States* v. *Crimmins,* 2 Cir., 123 F.2d 271; *United States* v. *Peoni,* 2 Cir., 100 F. 2d 401. Cf. *Krulewitch* v. *United States,* 336 U.S. 440; *Grunewald* v. *United States,* 353 U.S. 391; *Forman* v. *United States,* 361 U.S. 416; *Fiswick* v. *United States,* 329 U.S. 211, 217.

The crime of conspiracy is limited by the scope of the mutual agreement among the conspirators. When the Government attempts to prove a conspiracy by circumstantial evidence, the extent and limit of the common agreement, as in any circumstantial evidence case, must reasonably flow from the circumstances proved. The Government may not set the scope of the common agreement simply by allegations. *Kotteakos* v. *United States,* supra; *United States* v. *Wortman, supra.* The Government's own proof here established that the claimed agreement was limited both by the rehabilitation of Sun Valley and by defrauding the Pension Fund by misrepresentations to obtain loans.

Nevertheless, the Government threw together, and was permitted to prove, all transactions touching any of the defendants which might present the defendants in a bad light to the jury. *United States* v. *Wortman, supra.* The prosecution was not based on "definite proof of specific crime." *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408, 420. Many of the loans were neither material nor relevant to the conspiracy and scheme which was charged.

C. The case was submitted to the jury without a clear instruction requiring the jury to find a single conspiracy and scheme. This is in direct conflict with *United States* v. *Borelli,* 2 Cir., 336 F.2d 376. See also *Grunewald* v. *United States,* 353 U.S. 391; *Kotteakos* v. *United States, supra.* The Court instructed the jury that in order to prove membership in the charged conspiracy, it was necessary that the Government prove beyond a reasonable doubt that the particular defendant was aware of the "common purpose". (D.A. 2143). But the jury was never apprised that it must make the crucial determination of whether the Government's evidence proved the existence of one conspiracy and scheme or of several separate conspiracies and schemes. So, contrary to *Kotteakos,* the jury was permitted to find petitioners guilty simply because one central personality may have been involved in all the transactions.

This case thus presents important questions of general applicability as to what limits on the scope of conspiracy prosecutions are necessary for a fair trial for a specific offense.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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